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# Responding to Rawls: Toward a Consistent and Supportable Theory of Distributive Justice

David Elkins\*

## I. INTRODUCTION

Distributive justice is concerned with the question of how benefits and burdens, and in particular how economic resources, should be allocated. Contemporary discussions of distributive justice are dominated by Rawlsian methodology, which proceeds from the presumption that talents and social position are undeserved and cannot support claims of entitlement. While the distribution of such attributes is itself neither just nor unjust, the justice inherent in a society is measured by the extent to which it is willing to neutralize such morally arbitrary factors in determining the distribution of economic resources. Nevertheless, as material incentives are ordinarily required in order to encourage productive economic activity, a balance must be struck between the demands of equality and those of efficiency. The question is where to strike that balance.<sup>1</sup>

John Rawls argued that positions that people take with regard to questions of distributive justice may be influenced by their knowledge of how they themselves would fare under various structures. He therefore proposed investigating what principles would be adopted by individuals unaware of their own talents or social status—what he referred to as the “original position”—so that they would not be able accurately to predict how any particular structure would affect them.<sup>2</sup> Behind this “veil of

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1. JOHN RAWLS, *A THEORY OF JUSTICE* 67–72 (1971). The impact of Rawls’s work on political theory in general, and distributive justice in particular, cannot be overstated. “*A Theory of Justice* is a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy which has not seen its like since the writings of John Stuart Mill, if then. . . . Even those who remain unconvinced after wrestling with Rawls’ systematic vision will learn much from closely studying it.” ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 183 (1974).

2. RAWLS, *supra* note 1, at 18–19.

ignorance,” Rawls claimed, risk aversion would overcome all other considerations: one would not risk the little he might have in order to increase what he would receive were he one of the wealthy.<sup>3</sup> The result would, therefore, be the adoption of principles maximizing the welfare level of the least well-off (“the difference principle”).<sup>4</sup>

The difference principle is not, however, the only possible outcome of Rawlsian methodology. In particular, the degree of risk aversion that the participants would display might arguably range anywhere from the extreme of zero, in which case participants would presumably adopt welfare-maximizing principles conforming with classic utilitarianism, to the overwhelming role that Rawls assumed it would play.<sup>5</sup> The greater the risk aversion, the less willing the participants would be to sacrifice equality for greater total welfare.<sup>6</sup>

The evident truth of the proposition that individuals do not deserve, in a moral sense, the attributes which determine their distributive shares of social goods<sup>7</sup> and the apparently inexorable reasoning from that point forward seem to indicate that, while the difference principle itself might be disputable, some type of Rawlsian redistribution is morally required. In fact, the Rawlsian methodology is so powerful that, as Nozick himself claimed, today’s political philosophers must “either work within Rawls’s

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3. *Id.* at 152–53.

4. *Id.* at 75–78. Drawing on the terminology of game theory, Rawls described the difference principle as the “maximin solution to the problem of social justice.” *Id.* at 152.

5. Benjamin R. Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in *READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE* 292, 297–98 (Norman Daniels ed., 1975); see also NICHOLAS RESCHER, *DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION* 25–38 (1966) (discussing relationship between maximizing total welfare and distribution of welfare). Interestingly, Rawls assumed that one of the things that individuals in the original position would be unaware of would be their aversion to risk. RAWLS, *supra* note 1, at 137. It might also be noted that individuals in the real world are, in fact, willing to take risks. A person who chooses, for instance, a risky career path, indicates by her behavior that the possibility of great reward should she be successful is sufficient to offset the chance that she will end up with a lesser share of social goods than a safer career path promises. Although she knows, as does an individual in the original position, that she has but one life to live, she nevertheless is willing to risk being less well-off than otherwise if the chances of being better-off are sufficiently attractive.

6. See Menahem E. Yaari, *A Controversial Proposal Concerning Inequality Measurement*, 44 J. ECON. THEORY 381, 382 (1988) (presenting “equality-mindedness” in the real world as conceptually equivalent to risk aversion behind the veil of ignorance).

Throughout this Article, any principle of distributive justice that can be derived from Rawlsian methodology will be referred to as “Rawlsian,” whether or not it conforms to the difference principle. Any redistribution necessary to advance a Rawlsian conception of distributive justice will be referred to as a “Rawlsian redistribution.”

7. This truth is so evident that even Robert Nozick, libertarianism’s prime spokesman and Rawls’s ideological arch opponent, was forced to accept it. NOZICK, *supra* note 1, at 225 (“[C]orrectly, we describe people as entitled to their natural assets even if it’s not the case that they can be said to deserve them.”).

theory or explain why not.”<sup>8</sup> Therefore, in conformity with Nozick’s dictate, I will first explain why I find Rawls’s theory unacceptable.

Rawlsian methodology, if applied consistently, appears to require a redistribution of economic resources, not only among members of a given society, but also internationally. Nationality, after all, is no less arbitrary than other attributes, yet it plays a significant role in determining an individual’s life chances. Therefore, Rawlsianism would seem to imply cosmopolitanism, or the application of Rawlsian principles of justice without regard to national boundaries. Nevertheless, most social philosophers, including Rawls himself, reject cosmopolitanism and hold that Rawlsian principles are only applicable to, or can be limited to, the citizens or residents of a given society.<sup>9</sup> It should be noted that Rawls was willing to concede that wealthy societies do have a minimal obligation toward societies whose level of material wealth is insufficient to allow them to become “well ordered.”<sup>10</sup> He rejected, however, any notion of international redistribution that was more comprehensive.<sup>11</sup>

A number of arguments have been raised by proponents of what I shall refer to as “domestic Rawlsianism” to explain why Rawlsian principles are inapplicable internationally.<sup>12</sup> Nevertheless, if these arguments fail, and if one is unwilling to embrace the concept of a global Rawlsian redistribution, then one would be left with no alternative but to reject Rawlsianism itself. In other words, the dismissal, on intuitive grounds, of cosmopolitanism requires a similar dismissal of Rawlsianism.

Nevertheless, rejecting Rawlsianism does not necessarily imply retreating into libertarianism.<sup>13</sup> Libertarians avoid the conflict between

8. *Id.* at 183.

9. MARGARET CANOVAN, *NATIONHOOD AND POLITICAL THEORY* 28–29 (1996); JOHN RAWLS, *POLITICAL LIBERALISM* 11–12 (1993); JOHN RAWLS, *THE LAW OF PEOPLES* 115–20 (1999) [hereinafter RAWLS, *LAW OF PEOPLES*]; Yael TAMIR, *LIBERAL NATIONALISM* 121 (1993); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31 (1983); Michael Sandel, *The Procedural Republic and the Unencumbered Self*, in *COMMUNITARIANISM AND INDIVIDUALISM* 12, 22–24 (Shlomo Avineri & Avner De-Shalit eds., 1992).

10. RAWLS, *LAW OF PEOPLES*, *supra* note 9, at 106 (“Burdened societies . . . lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered. The long-term goal of (relatively) well-ordered societies should be to bring burdened societies . . . into the Society of well-ordered Peoples.”). Assisting burdened societies to become well-ordered involves emphasizing human rights and teaching them to manage their own affairs. *Id.* at 106–12. In some cases, although not in all, wealth transfer may be necessary. *Id.* at 108–09.

11. *Id.* at 119–20.

12. *See infra* Part II.

13. While accepting that attributes such as talents and social position are ultimately undeserved, *see e.g.*, NOZICK, *supra* note 1, at 225, libertarians nevertheless argue that individuals are entitled to whatever they receive in market exchanges or as gifts. Redistribution is inappropriate,

domestic justice and international justice by denying that justice demands redistribution, even domestically. However, this approach does not conform to what many would deem to be our considered judgments.<sup>14</sup> There is something not quite right with a world in which some individuals literally have more than they know what to do with, while others, no less deserving, lack basic sustenance. Libertarianism, I believe, fails to take into account most people's fundamental belief that vast discrepancies in material wealth cannot be completely ignored, especially when it is conceded that the rich do not have any desert-based claim to their holdings.

For a theory of justice to be acceptable, it needs to be both internally consistent and in conformance with our considered judgments.<sup>15</sup> I believe that domestic Rawlsianism fails on the first count and that cosmopolitanism and libertarianism fail on the second. Thus, in addition to being internally consistent, an acceptable theory would have to occupy the ideological middle ground between cosmopolitanism and libertarianism.<sup>16</sup>

If limiting the application of distributive justice to the domestic arena proves impossible, the only other approach appears to be to argue for a conception of justice that is more limited in intensity yet more extensive

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they claim, because there never was a distribution in the first place. An individual's holdings are achieved through a myriad of exchanges and transfers over which no one person or institution has any overriding control. FRIEDRICH AUGUST VON HAYEK, 'Social' or Distributive Justice, in THE ESSENCE OF HAYEK 63, 68–70 (Chiaki Nishiyama & Kurt R. Leube eds., 1984); see also NOZICK, *supra* note 1, at 149–50.

14. "Considered judgments" is a phrase coined by Rawls and defined by him as "those judgments in which our moral capacities are most likely to be displayed without distortion. . . . For example, we can discard those judgments made with hesitation, or in which we have little confidence[,] . . . those given when we are upset or frightened, or when we stand to gain one way or the other . . . ." RAWLS, *supra* note 1, at 47. Nevertheless, the source of our considered judgments—even those we retain after taking the proverbial deep breath and neutralizing whatever personal interest we may have—presents a serious problem in discussions of distributive justice. Our most powerful and unshakable basic attitudes are molded by historical and sociological forces of which we are ordinarily unaware. See JEREMY RIFKIN, ENTROPY: A NEW WORLD VIEW 5–6 (1980). Building philosophical castles on clouds of considered judgments may, therefore, merely serve to perpetuate accepted prejudices.

15. Rawls implicitly assumes that the considered judgments of all reasonable people would be similar. Without necessarily relying on such a premise, the arguments presented in this Article will assume that certain basic conceptions of right and wrong are common to most people. It may be conceded that those who do not will not find the arguments presented here compelling.

16. What Rawls refers to as "the liberal conception," the position that environmentally arbitrary factors should be neutralized and that distribution should accord to natural talents, occupies the appropriate middle ground. RAWLS, *supra* note 1, at 73. Nevertheless, liberalism fares no better than Rawlsianism in its attempt to avoid inconsistency. The first problem with liberalism, as pointed out by Rawls, is that natural talents are no more arbitrary than environmental factors and are no more deserved from a moral point of view. *Id.* at 75. The second problem is that national affiliation would appear to be one of those environmentally arbitrary factors which need to be neutralized. Liberalism, like Rawlsianism, would thus imply cosmopolitanism.

geographically. One may posit that justice is satisfied by something less than a Rawlsian redistribution, but that the demands of justice—limited as they are—are universal. Nevertheless, while the demands of justice are universal, a state, in regulating its internal affairs, might go beyond the demands of distributive justice and effect a more extensive redistribution, provided certain conditions are met. The theory of justice proposed in this Article is such an approach: a model of distributive justice that focuses on needs and their fulfillment and on redistribution beyond the dictates of distributive justice.

Part II of the Article explores the relationship between Rawlsianism and cosmopolitanism. It shows how Rawlsianism logically leads into cosmopolitanism and examines the various arguments which have been raised to avoid this result. The analysis will show that the arguments are ultimately unsuccessful and that domestic Rawlsianism must be rejected as internally inconsistent. This Part further argues that unless one is willing to embrace cosmopolitanism, one must reject Rawls's position that human society is under a positive moral obligation to neutralize the admitted unfairness inherent in nature.

As an alternative to Rawlsianism, Part III introduces a needs-based model of distributive justice. Although admitting that the natural distribution is unfair, this model does not view the inequality itself as imposing any moral duty on those who have more to share the wealth with those who have less. Rather it argues that where a person is in need and another person or group of persons is capable of satisfying that need at a non-prohibitive cost, there is a moral obligation to do so. This Part also discusses some of the differences between inequality-based justice and needs-based justice and attempts to show why the consequences of needs-based justice conform better to our considered judgments.

Part IV considers the implications of needs-based justice for domestic redistribution. Whatever duties are imposed by the terms of distributive justice must be applicable globally: needs-based justice requires that both the needs of compatriots and the needs of foreigners be addressed. It would seem to follow that, having satisfied those needs—or, more accurately, having gone as far in acting to satisfy needs as the terms of justice require—distributive justice can impose no further obligation to enact a more comprehensive domestic redistribution. If distributive justice requires a more comprehensive redistribution, then it is unclear why foreigners should not be entitled to benefit from it. If, on the other hand, distributive justice does not demand more than needs satisfaction, it is unclear how a more extensive domestic redistribution can be justified. Part IV addresses this issue and—in what is a mirror image of the analysis of Part II—examines possible arguments for a

more extensive domestic redistribution. The conclusion reached in Part IV is that distributive justice is incapable of imposing different obligations in the domestic and international arenas. This Part next examines whether it is possible to justify a more comprehensive domestic redistribution on a form of transactional justice embodied in benefit theory. Classic attempts to do so, which rely on the supposed greater benefit derived by the wealthy from government, are unconvincing. Part IV, however, argues that concern for the fate of compatriots, while insufficient either to limit or to expand the obligations of distributive justice, can justify the imposition of taxation for the purpose of improving the welfare of the less well-off beyond merely satisfying their needs. Finally, this Part considers some implications of the proposed model.

## II. RAWLS AND COSMOPOLITANISM

If morally arbitrary factors are truly improper criteria on which to stake distributive claims, justice would appear to require an international Rawlsian redistribution. Ostensibly, an individual's nationality would appear to be as arbitrary an attribute as that individual's race, gender, social position, or natural talents. Each of these attributes is part of the "natural lottery," the results of which should, according to Rawls, be neutralized as far as possible when determining distributive shares.<sup>17</sup> There would, therefore, be no reason to halt the redistributive process at national borders. Redistributing wealth among those who happen to be citizens or residents of a certain country and ignoring the claims of those located beyond its borders, merely on the basis of their inherited status as outsiders, would appear to be as morally arbitrary as redistributing wealth only among those of a certain racial or ethnic background, or only among members of a given social class and ignoring the claim of those not so classified.<sup>18</sup>

Reasonable individuals behind the veil of ignorance who were unaware of their national affiliation would not agree to allow their life chances to be determined by such affiliation any more than they would allow them to be determined by their natural talents. It is therefore surprising to discover that many social philosophers who adopt a Rawlsian conception of justice hold that the requirement to redistribute wealth is fully applicable only within the borders of a state and that the

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17. RAWLS, *supra* note 1, at 74.

18. See Loren Lomasky, *Toward a Liberal Theory of Natural Boundaries*, in BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES 55, 56–60 (David Miller & Sohail H. Hashmi eds., 2001).

claims of outsiders to participate in the redistribution may be justifiably ignored or, at the least, that a lesser level of redistribution is required to satisfy their claims.<sup>19</sup> This, in fact, was the position taken by Rawls himself. The only obligations of international distributive justice that Rawls recognized were those of richer states, vis-à-vis poorer states, to guarantee that the latter are able to reach the level of material prosperity necessary to sustain a well-ordered society.<sup>20</sup> Beyond that minimum level, Rawls argued that there is no moral obligation to redistribute wealth, even if an alternative distribution of the world's economic resources would be more advantageous to the world's worst-off persons or group of persons.<sup>21</sup>

The question which needs to be addressed is whether domestic Rawlsianism is a viable position or whether it suffers from a fatal internal inconsistency, deriving from the fact that the fundamental principle underlying Rawlsianism—that morally arbitrary attributes cannot ground entitlement—seems to lead inexorably toward cosmopolitanism. Saving domestic Rawlsianism from inconsistency, however, cannot be achieved by adjusting or “fine tuning” the fundamental Rawlsian principle so as to avoid cosmopolitanism unless the rephrased principle itself conforms to our considered judgments. For example, one may rephrase Rawls's fundamental principle in the following manner: the effects of morally arbitrary factors that impact an individual's welfare should be neutralized as far as possible, with the single exception of national affiliation, which, although just as arbitrary from a moral point of view, may legitimately determine what an individual is able to achieve in his or her life. This rephrased principle avoids cosmopolitanism, but at the cost of creating a conflict with our considered judgments. Why should humanity not attempt to neutralize, as far as possible, the effects of a person's national affiliation, when national affiliation is just as arbitrary, from a moral point of view, as are other factors whose effects Rawls argues should be neutralized?

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19. See *infra* Part II.A–D. Some political philosophers who advocate extensive redistribution simply ignore, explicitly or implicitly, the possible international ramifications of the positions they espouse. See JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* 170–74 (1994) (discussing what a just state must provide its citizens with no mention of the international arena); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 41 (2002) (arguing that the framework for discussion of tax policy is the state and explicitly ignoring questions of global justice and international taxation); ERIC RAKOWSKI, *EQUAL JUSTICE* 19 (1991) (discussing different notions of how a just state treats its citizens while ignoring international ramifications); see also JEREMY WALDRON, *John Rawls and the Social Minimum*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 250–51 (1993) (discussing people's entitlement to an equal share of social wealth or to a minimum provision without considering the position of those people who are not members of the society).

20. RAWLS, *LAW OF PEOPLES*, *supra* note 9, at 106.

21. *Id.* at 119–20.



Is it possible to restrict the application of principles of distributive justice to the internal affairs of a state and to ignore claims of foreigners who would like to participate in the redistribution? Non-cosmopolitan commentators who wrestle with the problem of the internationalization of justice have raised a number of arguments in their attempts to justify domestic Rawlsianism. The major justification attempts may be referred to as the benefit apportionment argument, the national association argument, the original position argument, and the functionality and practicality argument.

*A. Benefit Apportionment Argument*

Rawls introduced his analysis of justice as fairness by pointing out that human society is both cooperative and competitive. Through cooperation, people can collectively achieve a higher level of welfare than through individual effort. Nevertheless, he stated, although social cooperation is marked by an identity of interests, the interests of individuals conflict when it comes to distributing the benefits of that cooperation. As the benefit of social cooperation is finite, each individual's interest in taking for himself as much of that benefit as possible is incompatible with the interests of others. Justice, Rawls claimed, involves the fair distribution of this benefit, and his theory of justice as fairness was his attempt to describe how society should go about distributing the benefits of social cooperation.<sup>22</sup>

From Rawls's perspective, social cooperation appears to be both a necessary and a sufficient condition for social justice. Where social cooperation is lacking, the concept of justice is meaningless. Justice has meaning only within the framework of a cooperative society.<sup>23</sup>

However, this line of reasoning would imply that in a state of nature, individuals would be entitled to whatever level of welfare they were able to achieve and that no one would have any legitimate claims to the wealth produced by others. Thus Rawls, according to the benefit apportionment argument, accepts the Lockean perspective that, in such a state, each individual has exclusive rights in his or her own labor and in the product of that labor.<sup>24</sup> This in turn implies that each individual has

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22. RAWLS, *supra* note 1, at 4.

23. "I concede that a criterion of justice for domestic institutions would be sufficient if modern states were indeed closed schemes. In this case there simply would not *be* a global basic structure for principles of global justice to apply to." THOMAS W. POGGE, *REALIZING RAWLS* 240 (1989); *see also* CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 136–69 (1979).

24. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §27, at 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

the exclusive right to benefit from his or her own talents. On the other hand, the difference principle is premised on the assumption that individuals are not morally entitled to benefit from the talents they happen to possess by virtue of the “natural lottery.”<sup>25</sup> Thus the contention that justice is applicable in a state of nature would appear to undermine the entire logical structure upon which the difference principle is based.

Furthermore, natural talents by themselves are insufficient to produce the necessities of life. A person, no matter how talented, cannot produce food, clothing, or shelter without integrating a physical component. Locke, therefore, argued that when a person combines his labor with a part of the physical world, the rights of exclusive ownership that the person had in his or her labor flows into the physical component, and the person acquires exclusive rights to the product. According to Locke, the labor necessary to ground a claim of ownership in a part of the physical world can range from gathering nuts in the forest to cultivating a plot of land.<sup>26</sup>

This rationale for exclusive ownership does not flow directly from the first contention regarding the rights of each individual to his endowment. One might accept the latter and yet argue that because the product contains elements of both privately owned labor and the commonly owned physical world, rights in the product should be apportioned accordingly. The rest of humanity would therefore have a claim to a proportionate part of the product.<sup>27</sup>

Nevertheless, the benefit apportionment argument appears to indicate that Rawls accepts even this more controversial contention, based on the benefit apportionment argument: as combining one’s labor with the physical world is not an act of social cooperation, no one can legitimately raise any claim based on justice to share in the wealth created. In fact, Rawls’s position may be even more deferential to the natural right of ownership than was Locke’s. While allowing a person to combine his labor with that of the natural world and claim exclusive ownership in the product, Locke was careful to add the proviso that the laborer leave for others “as much and as good” as he took for himself.<sup>28</sup> Where resources are limited and the appropriation by one would negatively impact the ability of others to act similarly, the Lockean proviso would act to deny the laborer’s claim to exclusive rights in the product. Locke, therefore, limited the right to expropriate scarce natural resources for private use.

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25. RAWLS, *supra* note 1, at 73–74.

26. LOCKE, *supra* note 24, §28, at 288, §32, at 290–91.

27. NOZICK, *supra* note 1, at 174–75.

28. LOCKE, *supra* note 24, §27, at 288.

On the other hand, Rawls is considerably less restrictive with regard to the expropriation for exclusive use of part of the natural world. When considering the international arena, Rawls avers that each state has exclusive rights to the natural resources in its territory and is not required to share with other nations the wealth derived from its exploitation of those natural resources.<sup>29</sup> Rawls does not require that a state must leave for other states “as much and as good” as it took for itself. A state, according to Rawls, may legitimately claim exclusive rights to extremely scarce, and consequently valuable, resources.<sup>30</sup>

Introducing social cooperation changes Rawls’s position dramatically. From advocating a position that is perhaps even more deferential to the possibility of acquiring private property than that of Locke, Rawls argues that wealth should be drastically redistributed in accordance with the difference principle where there is social cooperation involved. The following hypothetical examines whether these two positions are, in fact, compatible.

Consider the case of two shipwrecked sailors, Mary and Paul, on a deserted island. For whatever reason, they go their separate ways, and each one fends for himself or herself. Assume that Mary turns out to be an excellent hunter-gatherer. She enjoys lavish meals and comfortable clothing; she is even able to stash away extra food and other resources for the proverbial rainy day. Paul, on the other hand, is a mediocre hunter-gatherer. He is unable to acquire much more than what he needs for bare subsistence and is therefore unable to accumulate anything for the future. According to Rawls, Mary is under no moral obligation to share her wealth with Paul. Each is operating completely independent of the other, and in the absence of social cooperation, there are no operative rules of distributive justice.<sup>31</sup>

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29. RAWLS, *LAW OF PEOPLES*, *supra* note 9, at 116–17.

30. Note also that, according to Rawls, the mere presence of natural resources in the state’s territory is sufficient to ground claims of ownership to those resources, even before the state exerts any effort to add value to those resources by combining them with its labor. Thus, while Locke held that ownership results from the combination of labor with part of the natural world, Rawls’s position apparently was that a state may claim rights to resources in its territory, without having added an iota of economic value. *Id.* at 117 (“[T]he arbitrariness of the distribution of natural resources causes no difficulty.”)

The acquisition of territory by a state is analogous to the acquisition of territory or other natural resources by an individual or group of individuals in a state of nature. A state may be viewed in this context as a group of individuals operating in a state of nature vis-à-vis other states and acquiring territory either through first possession or by conquest. *See* THOMAS HOBBS, *LEVIATHAN* 244 (Cambridge Univ. Press 1991) (1651) (“[T]he law of nations, and the law of nature, is the same thing.”). Interestingly, Rawls, when discussing the rights of a state to natural resources in its territory, does not consider how it came to possess the territory in question.

31. Rawls, it might be added, would apparently release Mary from any moral obligation to share her good fortune with Paul even if it turned out that Mary’s success resulted simply from her half of the island being easier to hunt and gather in. RAWLS, *LAW OF PEOPLES*, *supra* note 9,

Mary and Paul now consider the possibility of joining forces. A day or two of experimentation convinces them that together they can hunt and gather more effectively than they can separately; their joint take is greater than their separate takes combined. It would, therefore, be rational for them to continue their cooperation. As Rawls points out, however, while the two of them have a mutual interest in cooperating, their interests diverge when it comes to distributing the benefits of that cooperation.<sup>32</sup> Being rational, they will most likely bargain for the surplus wealth attributable to the cooperation. As the cooperation of each is a necessary condition for obtaining the surplus wealth, and each is equally capable of refusing to cooperate, they might end up splitting the surplus evenly between them, so that each would be entitled to what he or she would have acquired by working on his or her own plus half of the remainder. Alternatively, Paul may recognize Mary's superior skills and agree that the surplus be divided proportionally; if, for example, Mary's average take in the absence of cooperation was three times that of Paul's, then Mary might get three-quarters of the cooperative take.

Of course, the situation might be different if Mary and Paul were to marry, and especially if they were to raise a family together. In those circumstances, it would no longer be necessary to negotiate the price of social cooperation if, due to mutual affection and shared interest in the fate of their children, each of them has as his or her goal the welfare of the family unit. The couple might very well adopt Rawlsian principles in distributing their resources. Not only would the benefit of cooperation be shared, but so would each person's original endowment.

However, where Mary and Paul are independent actors negotiating for economic cooperation, it would not be reasonable to demand that Mary allow Paul to keep the entire surplus to compensate him for his relatively poor hunting and gathering skills. Doing so might be commendable on Mary's part, but it is unclear why justice would demand such action. In the same way, Mary might be commended for coming to Paul's aid before the commencement of cooperation between them, and yet Rawls would have imposed upon her no moral duty to do so.

Nevertheless, once Paul and Mary begin cooperating in the production of wealth, Rawls goes even further than vesting in Paul the right to the entire surplus wealth. As the worst off individual in the society, Paul would apparently have a claim to half of the entire take and, moreover, to half of the wealth stashed away in Mary's cave.<sup>33</sup> In such a

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at 116–17.

32. RAWLS, *supra* note 1, at 4.

33. Rawls would only allow Mary a greater share of the take if doing so were necessary in

situation the various arguments raised by Rawls to justify the difference principle would come into play. Mary does not deserve her exceptional skill in any morally meaningful way. She does not have any claim of moral desert to the wealth attributable to her natural talent. In Rawls's original position, Mary and Paul would not have agreed to allow the wealth to accrue to the one who happened to be in possession of the necessary skills.

But is the quantum leap from the justice-free realm of individual action to the difference principle-dominated realm of social cooperation justified? Mary's entitlement, in a state of nature, to whatever material level of well-being her natural talents allow her to achieve implies exclusive rights in the natural talents she happens to possess. These rights would, presumably, include the right to sell or trade the use of those talents and to retain for her exclusive use whatever she received in exchange.

From the perspective of justice as fairness, as subsequently developed by Rawls, the problem with denying the applicability of justice in a state of nature is that even in the absence of social cooperation, the welfare level that an individual is able to achieve is the result of factors that, in Rawlsian terminology, are arbitrary from a moral point of view.<sup>34</sup> As Rawls so strongly argues, the unequal distribution of talents is a fact. It is neither just nor unjust. What is just or unjust is the extent to which it is allowed to influence the distribution of primary social goods.<sup>35</sup> If it is assumed that a person deserves his natural talents, then the possession of those talents might ground an entitlement claim to the wealth which those talents produced. However, if, as Rawls claims, a person does not deserve her natural talents, it would not appear that she has any moral claim to the material wealth that those talents are able to produce, whether she exploited those talents within the framework of social cooperation or in a state of nature.<sup>36</sup> In other words, if a person has exclusive rights to her talents and to the wealth which they produce, she should be entitled to whatever she receives in exchange for exploiting them. If, on the other hand, she does not have exclusive rights to her

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order to induce her to continue hunting and gathering for Paul's benefit.

34. RAWLS, *supra* note 1, at 72.

35. *Id.* at 102.

36. Of course, a state of nature would, by definition, lack any mechanism by which to enforce redistributive claims. This, however, does not detract from the legitimacy of those claims. Indeed one of the main problems with a state of nature is the lack of enforceability of any natural right. Thus, natural right theory maintains, individuals establish governments in order to enforce their natural rights of life, liberty and property. If, as posited, their property rights include a portion of the wealth produced through the talents of others, governments would be charged with enforcing those rights too.

natural talents, then it is unclear why she should have exclusive rights to what they enable her to produce in the absence of social cooperation.

The same principles that were in play with regard to Mary and Paul apply in a more sophisticated market setting as well. Individuals negotiate for cooperation in their joint ventures. Those who own factors of production—such as laborers, lenders, property owners, and entrepreneurs—distribute among themselves the benefit of their cooperation in accordance with the value of their contributions. The ability of each owner of a factor of production to withhold her contribution should ensure that each owner receives a share commensurate with the marginal value of that contribution. The principles of transactional justice, assuming they are applied in practice, will ensure that no one is deprived of her fair share of the cooperative product through fraud, deceit, coercion, or the like. Again, if each individual has the exclusive rights to her own endowment—as the inapplicability of distributive justice in the absence of social cooperation would seem to indicate—then each individual has, by implication, the exclusive rights to the value of her contribution to the joint enterprise. Whatever she receives in exchange for that contribution is hers by right.

In contrast, the case for a Rawlsian distribution is premised on the argument that an individual has no intrinsic right to the wealth she produces. The absence of any prior claim of an individual to the wealth she produces enables society to redistribute that wealth in accordance with the difference principle. To posit otherwise would result in redistribution being tantamount to theft, as is argued, in fact, by libertarians.

Thus, the attempt to base domestic Rawlsianism on the benefit apportionment argument is impaled on the horns of a dilemma. If one posits that redistribution is inapplicable in a state of nature and that individuals in such a state are entitled to benefit from morally arbitrary factors, it follows that they would also be entitled to retain whatever they received in exchange for agreeing to cooperate in the joint production of wealth. Redistribution would be unjustifiable. On the other hand, if one posits that justice requires the neutralization of the effects of morally arbitrary factors even in the absence of social interaction, then, regardless of the existence or extent of international cooperation, the redistribution would need to be global in scope.

Arguing both for a natural right to the product of one's labor—or, more broadly, of the return from the use of any of one's means of production—and for a redistribution is not necessarily contradictory. In fact, my own position, as will be developed further on, incorporates both of these elements. The position presented here is merely that such a

natural right is inconsistent with a *Rawlsian* redistribution.

*B. National Association Argument*

Another attempt to restrict the application of Rawlsian redistribution is the argument that national association is what creates the rights and obligations associated with distributive justice. Without the ties implied by such association, goes the argument, the rules of distributive justice are inapplicable. However, this claim raises an important question: why is distributive justice inapplicable in the absence of national association, or, contrapositively, why is national association a necessary condition for distributive justice?

*1. Sympathy*

One attempt to support the national association argument is based on the claim that people naturally feel close to those with whom they share a common bond and a common destiny. Co-nationalists meet these criteria and evoke, therefore, a certain degree of altruistic concern. Thus people are usually willing to share their wealth with their compatriots beyond the extent to which they are willing to share with others with whom they do not share these common bonds.<sup>37</sup>

I see no reason to dispute the factual basis of this claim, which is evidenced, for example, by the press coverage of a natural disaster or an act of war or terrorism. The news services of a given country usually devote disproportionate attention to the fate of victims who happen to be nationals of that country. Presumably, the extent of this coverage results from the fact that the public is, or is assumed to be, particularly interested in the welfare of its compatriots. One may assume that people

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37. DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS 150 n.33 (1993) (“That our sense of solidarity is strongest where ‘us’ means something smaller and more local than the human race provides a strong argument against the feasibility of a world-wide system of distributive justice . . .”); CANOVAN, *supra* note 9, at 28–29 (observing that social justice theorists implicitly take for granted that demands for distributive justice are applicable within a community of members committed to sharing social goods); RONALD DWORKIN, LAW’S EMPIRE 207 (1986) (noting that political obligations are dependent upon fraternity among members of the political community); WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 225 (2001) (observing that people are willing to sacrifice for others only when there is a “sense of common identity and common membership uniting donor and recipient, such that sacrifices being made for anonymous others are still, in some sense, sacrifices for ‘one of us’”); AVISHAI MARGALIT, THE ETHICS OF MEMORY 74–76 (2002) (arguing that a nation can be an ethical community, but it is unreasonable to expect that all of humanity can be one, as caring requires contrast); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 190–91 (1989) (noting that moral obligations are toward those with whom we feel a sense of solidarity); TAMIR, *supra* note 9, at 121 (“The ‘others’ whose welfare we ought to consider are those we care about . . .”).

will be more receptive to sharing their wealth with their fellow nationals than with others with whom they do not feel this common bond.<sup>38</sup>

Nevertheless, feelings of closeness cannot ground claims of distributive justice. More pointedly, lack of these feelings cannot ground a denial of claims to distributive justice. A person's willingness to share his or her wealth with another individual or group of individuals, while perhaps laudable, is altruistic, and altruism is a concept considerably different from distributive justice. Justice is the set of principles which delineate those things to which an individual has a moral claim. Altruism is a selfless act by an individual after all claims of justice have been satisfied; it involves the voluntary waiver of just claims, or the voluntary and unreciprocated transfer, for the benefit of others, of justly held economic resources.<sup>39</sup>

Justice is not altruism. One who gives another his due is no more altruistic than a trustee who transfers trust property to the beneficiary. If for whatever reason legitimate claims of justice are not legally enforceable, then voluntarily satisfying those claims is laudable; it is not, however, altruistic. Returning lost property to its rightful owner, when that person does not know what happened to his property and is thus unable to take action to enforce his rights, is laudable. However, it is laudable precisely because it involves satisfying a claim of justice which would otherwise go unsatisfied. No altruism is involved aside from the effort exerted in returning the item, assuming the actor was not compensated for this effort. In order for the act to be considered truly altruistic, the actor must have a legitimate option to use the item in his possession for his own benefit. An altruistic act is an act beyond the call of moral duty. Sharing one's wealth with those of one's choosing is legitimate with regard to altruism, but it is not true with regard to justice. Claims of justice must be satisfied without regard to one's feelings toward those to whom one owes moral duties. Not liking someone is not a legitimate reason to steal from him; it is a legitimate reason not to give him a gift.

Sympathy with the fate of one's compatriots, like sympathy with the fate of the members of one's family, clan, or ethnic group, cannot, therefore, affect the just claims of outsiders. "I cannot give to you that to which you are entitled because I prefer to give it to someone close to me" is not justice; it is embezzlement. The idea that national feelings can somehow limit justice and confine it to the boundaries of a state must,

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38. In fact, the apparent greater willingness to share with compatriots will be an important element in the position I will develop later on.

39. Where the recipient is less well-off than the donor, and the donor's motivation in making the gift is to mitigate inequality, the act might be described as heroic. *See infra* Part IV.F.



therefore, be rejected.

## 2. *Possession of talents*

A second attempt to ground the national association argument is the claim that the talents of a society and the wealth derived from those talents belong to members of that society and are, therefore, theirs to dispose of and to distribute as they see fit.<sup>40</sup> This claim is, in some ways, similar to the benefit apportionment argument considered above. They both proceed from the assumption that those who are not part of the economic institutions concerned have no right to share in the distribution. On the other hand, the emphasis of each argument is different. The benefit apportionment argument proceeds from Rawls's claim that justice concerns the fair distribution of the benefits of social cooperation. The claim presently being considered is that the country possessing the talents has the intrinsic right to distribute the product of these talents as it sees fit.

However, talents are most immediately possessed by individuals. Indeed, when individuals with talents belong to a society, the talents may be said, as a factual matter, to be possessed by that society. However, in the same way, when those individuals are part of the human race, it may be said that the talents are possessed by humanity. If the possessor of talents is entitled to distribute the economic advantage derivable therefrom, then identifying the possessor of the talents would appear to entail far-reaching consequences. Asserting that the individual possesses the talents and the right to benefit from them undermines Rawlsian redistribution and leads toward libertarianism. Identifying humanity as the possessor leads to cosmopolitanism. Thus, it appears arbitrary to claim that the country possesses the talents and is free to distribute the benefits as it sees fit.<sup>41</sup>

However the problem with this particular claim, which proceeds from the assumption that a talent-possession society has the right to exclude outsiders from benefiting from them, goes deeper. The proposition is Nozickian in nature and appears to undermine not only

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40. DAVID MILLER, ON NATIONALITY 84–85 (1995) (arguing that social justice occurs mainly within national communities and that each community is entitled to the resources created by its own members); Sandel, *supra* note 9, at 20–24 (describing, and rejecting, Rawls's argument that talents are the property of the community).

41. Imagine, for example, that particular talents are located in an individual who is part of an ethnic community in a given country. Are the talents possessed by (a) the individual, (b) the ethnic community, (c) the country, or (d) humanity? Choice (c), the only answer which would justify domestic Rawlsianism, is not incorrect; it is simply not more correct than any other answer. Reliance on that answer to justify domestic Rawlsianism is hardly compelling.

cosmopolitanism, but domestic Rawlsian distribution as well. If mere possession creates entitlement, as Nozick argued,<sup>42</sup> then, just as the country has an entitlement vis-à-vis the rest of the world, the individual would have an entitlement vis-à-vis the rest of society. In other words, were a given society to say to other societies that it has the right to exclude them from benefiting from the talents it possesses, then, when the society in question came to distribute internally the resources at its disposal, it would be open to a compelling claim by the individual in whom those talents resided that he has the right to exclude his compatriots from benefiting from his talents. Of course, countering this argument by pointing out that the particular individual possesses those talents by mere happenstance and that as a consequence he has no moral claim to the wealth which those talents generate exposes the society in question to a similar claim by foreigners. The result, again, is that rejecting cosmopolitanism leads to libertarianism and rejecting libertarianism leads to cosmopolitanism. The present argument thus fails to provide a coherent doctrine capable of rejecting both libertarianism and cosmopolitanism in favor of the middle position of domestic Rawlsianism.

### 3. *Associative obligations*

Some commentators have argued that the very act or circumstance of association creates among its members rights and corresponding obligations, the nature of which depend upon the type of organization. These mutually held rights and obligations are not necessarily dependant upon an individual voluntarily joining the association or consenting to the others joining. The mere circumstance of membership in the association is enough to create a bond of rights and obligations which does not exist vis-à-vis non-members.<sup>43</sup>

When the association concerned is a state, the rights and obligations concerned include those of distributive justice. Wealthy members of the society have an obligation of concern towards less well-off members and, consequently, are required to share their wealth with them. The wealthy of country *A*, however, lacking any associative relationship with the poor of country *B*, have no duty of concern for them.<sup>44</sup>

The problem with this argument, however, is that it assumes the very proposition which it purports to prove. The question of why involuntary

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42. NOZICK, *supra* note 1, at 225–26.

43. DWORKIN, *supra* note 37, at 197–98; MILLER, *supra* note 40, at 83; WALZER, *supra* note 9, at 31.

44. TAMIR, *supra* note 9, at 100–01.

association creates rights and obligations—and in particular why national association creates the rights and obligations inherent to distributive justice—is left unexplained.

Voluntary association in an institution often involves the assumption of certain obligations. These obligations may be explicit or implicit, legal or moral, long-term or temporary. A group of individuals who meet once a week to play basketball may take upon themselves, through their behavior, the obligation to play at a certain level of seriousness, and to inform each other of a change in time or venue. Membership in a trade union implies cooperation for the sake of achieving the best working conditions for all. The obligations of friendship are more complicated and depend to a great extent on the degree of friendship and the terms implicitly agreed upon through the behavior of the parties. In all these cases, however, the obligations are consensual. A person is not obligated to more than the terms of association warrant. The mere fact of association, even voluntary association, does not imply rights and duties of distributive justice.

Certain associations, it is true, are founded upon terms which simulate distributive justice. For example, membership in a classic kibbutz requires the individual to accept principles of economic and social cooperation based upon the Marxist concept of “[f]rom each according to his ability, and to each according to his needs.”<sup>45</sup> Nevertheless, the source of these obligations is not the moral duties of abstract distributive justice, but rather the contractual relationship among the members.

National association—in contrast to the relationships defined by friendship or by membership in a trade union or a kibbutz—is by and large involuntary.<sup>46</sup> For most individuals, nationality is determined by the place of their birth or by the nationality of their parents. Because of the dearth of choice with respect to nationality, imposing the obligations of

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45. Karl Marx, *Marginal Notes to the Programme of the German Workers' Party*, in *CRITIQUE OF THE GOTHA PROGRAMME* 17 (Foreign Languages Press, Peking, 1st ed. 1972) (1875); see NAAMA SABAR, *KIBBUTZNIKS IN THE DIASPORA* 7 (2000) (noting the relationship of the traditional purposes of the kibbutz and Marx's communist ideal, in that “[t]he kibbutz was traditionally based on the premise that the individual contributes to the collective according to his/her ability and in return the kibbutz provides for all his/her needs”).

46. Where national association is voluntary, one might view the obligations implicit in such association as contractual. For example, a person who voluntarily immigrates to, and is naturalized in, a socialist country might be considered as having taken upon herself the terms of association of that country. Her subsequent complaints regarding the high level of taxes imposed to finance public services and transfer payments could be more easily ignored than similar complaints by one born in the country. In the same way, a person who voluntarily immigrated to a traditional, strongly patriarchal society would have considerably less standing to object to the structure of that society than would a native-born individual. In both instances, the immigrant chose to live under those terms. The inherent justice in the structure is therefore less relevant as far as she is concerned.

distributive justice because of nationality cannot be seen as resulting from any obligation undertaken by an individual when joining the association. The question of why the happenstance of national association creates such obligations remains unanswered.

Supporters of the national association argument may, nevertheless, claim that a person does not choose his family and yet the obligations a person has towards other members of his family are perhaps the most intense of any obligatory duty. Analogizing from the family to the country, a person may have obligations merely by being a member of a country whether or not he chose that status.<sup>47</sup> This argument merits serious attention. Nevertheless, it must fail. The fact that family attachment imposes certain obligations does nothing to further the national association argument.

The first problem with extrapolating from obligations toward one's family to obligations toward one's compatriots is that the moral source of obligations toward one's relatives is itself not clear. With regard to one's spouse and one's children—those individuals toward whom one is normally assumed to have the most intense obligations—the question can be sidestepped by noting that in almost all cases, marriage and parenthood are the result of voluntary acts. By marriage or by procreation a person explicitly or implicitly accepts the obligations inherent in the consequent relationship.

The obligations of children toward their parents are much more limited and might be grounded in terms of reciprocity. That is, children may have duties toward their parents in view of the support which they themselves received, even though their parents, by the very act of begetting children, unconditionally accepted upon themselves the obligation to support their progeny.<sup>48</sup> With regard to other relatives, however, both the scope and the grounding of one's obligation are far from clear. What is the nature and extent of one's obligations toward one's sibling, uncle, aunt, niece, nephew, cousin, or more distant relation, merely by dint of the family connection?<sup>49</sup> Why is one so obliged? These questions warrant analysis beyond the scope of the present work. However—and this is the essential point—analagizing from a type of obligation whose scope and grounding are themselves so

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47. DWORKIN, *supra* note 37, at 201; WALZER, *supra* note 9, at 41 (“[S]tates are like families . . . for it is a feature of families that their members are morally connected to people they have not chosen . . .”).

48. For this reason most people, for example, would probably feel that a child abandoned by his parents has little or no obligation toward them.

49. Relatives may, of course, also be friends, and in those cases the obligations of friendship and of family—neither of which is in any case explicitly delineated—would commingle. The text, however, is considering obligations based merely on the family relationship.

unclear is difficult at best and useless at worse.

Second, even if obligations based upon family relationship were sufficiently clear to show that involuntary associations could create mutual rights and obligations, it certainly would not show that every involuntary association actually does so.<sup>50</sup> The question of whether or not the mere fact of citizenship or residency in a given country constitutes the type of involuntary association entailing mutual rights and obligations cannot be satisfactorily resolved by a claim, however well founded, that it is not impossible for involuntary association to do so.

Third, even assuming that the analogy with the family is sufficiently convincing to permit the conclusion that national association does entail mutual rights and obligations, such an analogy could not successfully ground the associative obligation argument. It must be convincingly demonstrated that national association not only entails mutual rights and obligations, but it must also be shown that these rights and obligations include Rawlsian distributive justice. To the best of my knowledge, no supporter of domestic Rawlsianism has offered such a proof. Furthermore, it would appear that such a demonstration would be highly unlikely. The specific entitlements and responsibilities vis-à-vis relatives outside of the nuclear family may not be entirely clear; however, what may be stated with a fair degree of certainty is that they are not normally considered to include Rawlsian distributive justice. Such being the case, it appears impossible to derive obligations of national distributive justice from the mutual rights and obligations of the non-nuclear family.

#### *4. National association argument: Concluding thoughts*

While perhaps striking a certain intuitive chord, the national association argument cannot be accepted on a priori grounds, but requires a demonstration of what exactly there is about national association that grounds claims of justice. In my opinion, claims advanced to support this thesis fail the test of serious analysis. In fact, even proponents of the argument often admit the weakness of the claims they themselves advance.<sup>51</sup>

Why, then, does the national association argument continue to be raised? It may be that its true source is the intuitively based assumption that rules of distributive justice do not apply to foreigners or, alternatively, that obligations and rights of distributive justice are somehow less binding, or are secondary to, rights and obligations

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50. The fact that membership in certain associations bestows some benefit cannot support a claim to Rawlsian redistribution. See *supra* Part II.A.

51. See, e.g., TAMIR, *supra* note 9, at 117–21.

towards compatriots. National association seems to many to be both a necessary and a sufficient condition for the operation of distributive justice. Nevertheless, when the conclusion is subject to rigorous analysis, it is found wanting. Despite the fact that every explanation proposed to justify it fails to do so, the argument spawns an ipso facto life of its own and becomes self-sustaining. National association is offered forth as its own proof of validity.<sup>52</sup> It does not require a great deal of training in the art of rhetoric to spot the weakness of this attempt to ground the argument.

### *C. Original Position Argument*

One attempt to justify domestic Rawlsianism posits that individuals in Rawls's "original position" would opt for institutions designed to distribute a society's resources in accordance with Rawlsian principles but would refrain from cross-border redistribution.<sup>53</sup> Rational, self-serving individuals who knew that they would be members of a prosperous society would want to mitigate or eliminate the risk that they would be among the least well-off in that society and would therefore presumably adopt an internal Rawlsian redistribution of wealth. Knowing that they were to be members of a well-to-do society, rational self-interest would indicate that they would refrain from sharing their wealth with less fortunate foreigners.

The problem with this argument is that the only method by which to achieve a consensus for domestic Rawlsianism would be to limit participation in the mechanism of the original position to individuals who knew that they would be members of a prosperous society.<sup>54</sup> Completely risk-averse individuals who knew that they had only one life to live and who knew that there existed the possibility that they would be among the world's poorest would not agree to a scheme whereby rich countries would be entitled to redistribute wealth internally and to ignore the condition of those located outside their borders. Nor would they agree to a scheme whereby individuals residing in a given country would have any sort of prior claim to the wealth which happened to be located in or

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52. *Id.* at 121 (rejecting arguments based on sympathy and associative obligations, nevertheless concluding that "[t]he 'others' whose welfare we ought to consider are those . . . who are relevant to our associative identity," and "the community-like nature of the nation-state is particularly well suited, and perhaps even necessary, to the notion of the liberal welfare state").

53. *Id.* at 113.

54. RAWLS, *LAW OF PEOPLES*, *supra* note 9, at 26, 30–32, 82–83; *see also* RAWLS, *supra* note 1, at 377–78 (principles of justice apply to societies as units and are agreed upon by members of those societies in the original position).

produced by that country.<sup>55</sup>

Limiting participation to members of a given society begs the question of the justification for such a limitation. Since national affiliation is undeserved and therefore arbitrary from a moral point of view, it is unclear why only the views of those known to be nationals of a given country should be taken into account in deciding issues of justice. One could similarly convene an assembly of individuals who knew that they were going to be members of a particular ethnic group or of a certain social class. The principles of distributive justice which would emerge from such conventions would differ radically from the principles which would emerge were the participants put in a “pure” original position, in which they would be given no information about their condition. In fact, by carefully screening participation in the convention and by monitoring the information given to the participants, one could probably compel the adoption of just about any theory of distributive justice one chose.

Thus the original position argument does not appear to have any basis in Rawlsian philosophy. Lifting the veil of ignorance by allowing certain individuals, who know which society they are to be members of, to determine how resources are to be allocated is inconsistent with the principles underlying the use of the original position to establish principles of justice.<sup>56</sup>

#### *D. Functionality and Pragmatic Arguments*

##### *1. Domestic redistribution as furthering international redistribution*

Another attempt to justify domestic Rawlsianism is the argument that cosmopolitanism is best achieved by each country implementing a Rawlsian redistribution within its own borders. Were each country to do so individually, it is argued, the result would be a global Rawlsian redistribution. Furthermore, the argument states that adoption of a regime of domestic redistribution is not inconsistent with cosmopolitanism; rather, domestic redistribution supports and furthers the aim of cosmopolitanism.<sup>57</sup>

However, a global difference principle would require that resources

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55. See POGGE, *supra* note 23, at 242.

56. RAWLS, *supra* note 1, at 12 (noting that the veil of ignorance “ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances”).

57. CANOVAN, *supra* note 9, at 34; MILLER, *supra* note 40, at 51–53 (referring to ethical obligations in general and not specifically to Rawlsian redistribution).

be distributed first to foreigners when they are worse off than the worst-off compatriots. Recall that for Rawls, the preferred distribution is that in which the distributive shares of the worst-off are maximized, even where overall or average utility is sacrificed.<sup>58</sup> Therefore, even if logistic difficulties mean that fewer foreigners than locals would be helped or that more of the resources would be used for the expenses of the distribution process itself, the difference principle would nevertheless require that the wealth be redistributed internationally so as to maximize the welfare of the worst off.

## 2. *Ineffectiveness of international redistribution*

A related claim, which simply takes the functionality argument to an extreme, is that the mechanism for international redistribution is nonexistent.<sup>59</sup> Given the institutions presently available, a state, try as it might, is simply incapable of doing anything to ease the plight of poor individuals outside its borders. Resources which it attempts to devote to international redistribution are, in essence, merely being thrown away.<sup>60</sup>

The difference principle holds that when the welfare level of the worst-off is the same under alternative distributions, the favored distribution will be the one in which the welfare of the next worse off is maximized and so forth.<sup>61</sup> It would seem to follow that if the state's redistribution policy can have no effect on the welfare of certain individuals, then the welfare of the least well-off who can be affected should be maximized.

By the terms of the functionality argument, the welfare of those outside the state's borders is unaffected by any action the state may take. Even if those located in foreign countries include the world's worst-off individuals, their fate should be effectively ignored when determining the ideal distribution. Thus, when foreigners cannot be affected by a state's redistribution policies, implementation of a scheme of domestic Rawlsianism would in fact be the most the state could do to further a global Rawlsian redistribution.

However, this argument proceeds from a faulty factual premise. It is true that the institutions of the developed world are ordinarily vastly more efficient than corresponding institutions in underdeveloped

58. RAWLS, *supra* note 1, at 76–78.

59. See AMY GUTMANN, LIBERAL EQUALITY 171–72 (1980); Samuel Freeman, *Introduction: John Rawls – An Overview*, in THE CAMBRIDGE COMPANION TO RAWLS 1, 50–51 (Samuel Freeman ed., 2003).

60. For example, donor countries have few means at their disposal to ensure that the funds they contribute actually reach the most needy in the poorer countries.

61. RAWLS, *supra* note 1, at 83.



countries or than international institutions, assuming they exist at all. It is, therefore, true that domestic redistribution is ordinarily easier than international redistribution and that the costs of the distributive process itself are considerably less. Nonetheless, it is not accurate to claim that international redistribution is realistically impossible. Developed countries, as evidenced by their actions, do not apparently believe so either. Most, after all, do give some amount of foreign aid. One may assume that they would not do so unless they were convinced of its potential effectiveness.<sup>62</sup>

Furthermore, to the extent that the argument is true and that attempts at international redistribution are doomed to failure for lack of an institutional structure to support them, the conclusion should not be that justice is satisfied by domestic Rawlsianism. Instead, the conclusion should be that the international institutions as presently construed are unjust, hardly an earth-shattering revelation.<sup>63</sup>

Finally, consider the case of individuals living in developed countries, where the means of distribution are relatively efficient. Why should the wealthy of one country be obliged to share their wealth with disadvantaged members of their own society to a greater extent than they are obliged toward disadvantaged members of the other country?<sup>64</sup> The argument that there are no effective means of redistributing wealth is certainly not applicable, especially considering that the well-off of each country are expected, under a Rawlsian model, to share their wealth with their own society's disadvantaged.

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62. The argument presented is not that countries necessarily give foreign aid out of a sense of moral duty as opposed, for example, to altruism. The point is that, whatever their motives, their actions indicate an acknowledgement on their part that transfer payments to underdeveloped countries can be effective, even considering the inefficiency of the institutions involved.

63. KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* 26 (2004) (stating that international institutions are often accomplices in the exploitation of weaker states).

64. It is interesting to note the following comment by John Arthur and William H. Shaw: [D]isparity of wealth itself cannot be the source of . . . injustice. (Only in a cosmic or poetic sense is it unjust for me to thrive on my Iowa farm while you barely eke out an existence in the Yukon.) If we are to speak of justice at all, there must be some relation between the parties by virtue of which a right is violated or an unfairness done.

John Arthur & William H. Shaw, *On the Problem of Economic Justice*, in *JUSTICE AND ECONOMIC DISTRIBUTION* 5 (John Arthur & William H. Shaw eds., 2d ed. 1991). Note that the authors refer to the lack of obligation of a resident of Iowa toward a resident of the Yukon and not, for example, toward a resident of Alaska.

### 3. *Lack of support for international redistribution*

Another claim raised under the banner of pragmatic arguments is that the voters in the wealthy countries would never accept anything close to cosmopolitanism and that seekers of international justice should therefore moderate their demands in order to have any hope of success.<sup>65</sup> This claim, however, is perhaps the least valid of all. If wealthy countries are not morally entitled to their holdings, then the question of whether or not the voters in those countries are willing to share the wealth they possess is immaterial. If analogies are appropriate here, consider the unwillingness of the aristocracy to waive their feudal privileges; the long-standing refusal of the South African government, representing the majority of white voters, to grant suffrage to the rest of the population; or the decision by a hypothetical thieves' guild to reject the concept of restitution. In each case, the possessors of a social good desire to continue holding on to it. They may even have the physical or political power to reject competing claims. Nevertheless, possession, desire, and power do not justify a claim.

It is true that a reformer might, for practical reasons, choose those battles which she feels she may be able to win. Perhaps it is better to work, with some chance of success, for a slightly less unjust world than to labor futilely for a much more just one. Nevertheless, the degree to which those in possession of the social good respond to pleas for justice cannot in itself be a factor in determining whether their holdings are theirs by right.

### *E. The Failure of Domestic Rawlsianism*

Rawls's contention that the natural distribution is unfair and that people do not deserve their talents, their social position, or their good or bad luck has considerable persuasive force.<sup>66</sup> When confronted with those who are not fortunate enough to possess the talents necessary to achieve a lifestyle easily attainable by others, it is difficult to deny the arbitrariness inherent in nature's selection of whom to favor.<sup>67</sup>

Rawls's subsequent claim, regarding a positive moral duty to

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65. CHARLES JONES, *GLOBAL JUSTICE: DEFENDING COSMOPOLITANISM* 77 (1999) (referring to such views); KYMLICKA, *supra* note 37, at 225.

66. Even where talents are diligently developed over a long period of time and might therefore be considered to have an element of desert attached to them, the industriousness and patience which enabled their development were themselves not deserved.

67. As noted earlier, even Nozick felt obliged to concede the point. NOZICK, *supra* note 1, at 225.

neutralize the effects of nature's unfairness,<sup>68</sup> is more contentious. One might accept the arbitrariness of the natural distribution without agreeing that human society has an obligation to do anything about it. The maxim "life is unfair" is both an admission of the capriciousness of nature and an admonition to ignore the unfairness. It may be argued that a psychologically healthy individual will focus on what he has and on doing the best he can with it, rather than dwelling on the unfairness of life.

National affiliation would appear to be one of those arbitrary attributes whose impact upon an individual's life chances should, from a Rawlsian viewpoint, be neutralized. However, even those social philosophers who ostensibly view wealth redistribution as a primary demand of justice do not, in general, ascribe to the internationalization of domestic distributive principles. Some simply refuse to consider international aspects of redistribution, indicating their hesitation to extend the principles they extol to cover those living outside the borders of the state; others, including Rawls himself, go to great lengths to justify either limiting the scope of redistribution to the domestic arena or adopting different standards of justice for domestic and international redistribution.

Where a principle leads inexorably towards a result contrary to ordinary intuition, one is faced with the choice of abandoning the principle or rejecting the intuition. If, as most social philosophers appear to believe, the intuitive rejection of an international Rawlsian redistribution is well founded, the most obvious conclusion is that the basic tenet of Rawlsianism itself is somehow flawed. Perhaps the idea of a positive moral obligation to neutralize the effects of nature's arbitrariness does not conform to our considered judgments after all.

The rejection of cosmopolitanism, in other words, implies a rejection of the underlying principle from which it flows: that morally arbitrary attributes cannot serve as the basis for claims of entitlement. This is the same principle upon which all of Rawlsian methodology ultimately rests. Thus, unless one is willing to embrace cosmopolitanism, one must reject Rawlsianism.

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68. RAWLS, *supra* note 1, at 102.

## III. NEEDS-BASED JUSTICE

Rejecting Rawlsianism does not require retreating into a libertarian worldview. The fact that human society may not be required to mitigate the unfairness inherent in nature does not imply that people are relieved of all responsibility for the plight of fellow members of their species. This Article proposes that the duty to act arises when one individual is in need of some good and another is able to satisfy that need at a non-prohibitive cost to himself. Imagine, for instance, a desert traveler who encounters an individual dying of thirst. Assuming that the traveler is carrying with her more than enough water to meet her own needs, does she have a moral obligation to give the other some water and thus to save his life? The proposed duty to act suggests that she does have a moral obligation to share her water. Additionally, were she, out of either apathy or maliciousness, to ignore the other's needs and do nothing, she would be acting immorally.

At this point, some may question the source of the traveler's moral obligation to come to the other's assistance. As the other would be no better off had the traveler never existed, the argument could be made that the other has no claim to the traveler's assistance, assuming that the traveler is in no way responsible for the other's predicament and is not preventing anyone else from coming to the rescue. The traveler, it may be argued, might help if she desires to do so—and such an act might be commendable—but she is under no moral obligation to act. I would reject this argument and instead contend that the source of the traveler's obligation to assist in this situation is rooted simply in her own humanity.<sup>69</sup> Although she is in no way responsible for the other's predicament, failure to act would nevertheless constitute a breach of her moral duty. Furthermore, it would appear that this position reflects most people's common understanding of their moral obligations.

Note that the moral obligation of the traveler is not based on inequality. It is not grounded on the fact that her possession of a sufficient supply of water is the result of factors—foresight, luck, and so forth—that are ultimately arbitrary from a moral point of view and that she is thus undeservedly better off than the other.<sup>70</sup> Were she to encounter another person who was simply less wealthy, she would be

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69. It is admittedly difficult to substantiate this position other than to rely on an intuitive sense of what is right. I concede that one who sees nothing wrong with allowing the individual encountered to die of thirst in the circumstances described would probably not find the arguments presented in this Article compelling.

70. Nor, I might add, is it grounded on any claim of transactional or compensatory injustice. Again, we assume that the traveler is in no way responsible for the predicament of the other.

under no obligation to share her undeserved good fortune. Her obligation to assist is based on the other's needs and on her ability to satisfy those needs at a non-prohibitive cost to herself.<sup>71</sup>

Consider now the situation in which the traveler's supply of water is barely enough to meet her own needs, such that giving some of her water to the person she encountered would involve risking her own life. In such a situation, she does not have a moral duty to share her water. One is not obliged to satisfy the needs of another when the cost or the risk to oneself is too great. Herein lies the distinction between moral duty and heroism. Heroism involves satisfying the needs of others above and beyond the call of moral duty. One who saves another at no risk to himself has merely fulfilled a moral duty, whereas one who risks himself to save another has acted heroically.

Saving another at no risk to oneself may be commendable, but the commendation would be the equivalent of commending a person for driving for years without committing a traffic offence. Although a person should not, perhaps, be commended simply for fulfilling his legal obligations, the fact is that most of us do occasionally violate traffic laws. One who refrains from doing so may, therefore, deserve some commendation. The commendable character of the heroic act, however, is qualitatively different. If saving the victim involves the assumption of sufficient risk, then ignoring the needs of the victim would be a morally legitimate course of action. The commendation in this situation is not for failure to violate a moral duty, but for acting when no moral duty existed in the first place.

Moral duty comes into play when one is confronted with another person in need and the costs or risks of providing that need are not prohibitive. Needs, however, must be distinguished from wants. The fact that another individual wants something that I have the power to provide at little or not cost to myself imposes upon me no moral duty to supply that want, unless that want can be classified as a need. Nevertheless, and notwithstanding the centrality of the distinction between needs and wants, this Article does not attempt to demarcate a line between them. Reasonable people can differ with regard to what is a need and what is merely a want.<sup>72</sup> As a bare minimum, though, anything necessary for the

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71. Cf. WALZER, *supra* note 9, at 33 (stating that among strangers, positive assistance is required if it is needed urgently by one of the parties and the risks and costs of giving it are relatively low for the other party).

72. See KATE SOPER, ON HUMAN NEEDS: OPEN AND CLOSED THEORIES IN A MARXIST PERSPECTIVE 6–18 (1981) (arguing that the distinction between needs and wants is a political issue); WALDRON, *supra* note 19, at 264; DAVID WIGGINS, NEEDS, VALUES, TRUTH: ESSAYS IN THE PHILOSOPHY OF VALUE 2–17 (1987) (discussing different ways of distinguishing between needs and wants and focusing on the degree of harm envisioned if the need or want is not met).

sustaining of life could be universally recognized as a need.

Similarly, this Article does not delineate exactly what cost or what risk might be considered prohibitive. Again, reasonable people might come to different conclusions. However, at least in the extreme cases, it should be possible to reach universal consensus. For example, where one is capable of saving another's life at a cost that would not seriously affect the welfare level of the actor, failing to act is an abrogation of moral duty.

The next step is to apply this conception of moral obligation to the traditional realm of distributive justice. Any definition of material needs, as opposed to wants, would have to include those goods and services necessary for physical survival. Reasonable persons may, of course, argue that material needs include more than mere sustenance, that an individual requires the means not just to live but also to make life worthwhile.<sup>73</sup> Nevertheless, this Article focuses on sustenance because basic sustenance would certainly be included in any reasonable basket of material needs. It would be hard to argue that a person only wants, but does not need, enough food to avoid starvation; that he only wants, but does not need, access to a potable water supply; or that he only wants, but does not need, some protection from the elements.<sup>74</sup> Such being the case, it would follow that people, individually and collectively, who know that others are lacking basic sustenance and who are capable of satisfying that need have the moral obligation to do so, provided that the cost of providing such needs is not prohibitive.

Because needs-based justice limits claims of justice to the satisfaction of needs, it is more restrictive than inequality-based justice. The mere fact that individual *A* undeservedly has more of *X* than does individual *B* is not sufficient grounds under needs-based justice to impose a duty, even a *prima facie* duty, to redistribute. Needs-based justice, while recognizing the arbitrariness of the natural distribution, does not oblige humanity to right the wrongs of Mother Nature.<sup>75</sup> Thus, the "merely rich" would have no claim of distributive justice against the "super rich," even though their difference in wealth is presumably undeserved. An inequality-based argument for redistribution, on the other hand, would hold that because one has more than the other, despite

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73. Even among those accepting such a premise, the question of what it takes to make life worth living—or, more specifically, what are the material resources which would enable a person to make his life worth living—is obviously debatable.

74. Rawls, who seems to adopt a needs-based approach to international justice, similarly does not define basic needs. RAWLS, *LAW OF PEOPLE*, *supra* note 9, at 119.

75. Or, more accurately, to mitigate nature's unfairness, as nature cannot be judged in terms of right and wrong. RAWLS, *supra* note 1, at 102.

the lack of desert, a claim for redistribution would ostensibly arise.<sup>76</sup>

### *A. Choice and Responsibility*

With regard to the role of choice and responsibility in determining the demands of justice, the obligations of needs-based justice are broader than those of inequality-based justice. For inequality-based claims to redistribution, a time slice comparison is patently inappropriate. The fact that, at a given moment in time, one individual is wealthier than another cannot serve as the basis of a claim for mitigating the inequality. Assume, for example, that at time  $t_0$ , two individuals are similarly situated by whatever criteria are considered appropriate. At time  $t_1$ , individual *A* consumes part of his material holdings while individual *B* chooses to delay consumption until time  $t_3$ . A time slice comparison of the two individuals at time  $t_2$  would show that that individual *B* is better off than is individual *A*.<sup>77</sup> Nevertheless, it does not appear that this time-slice difference in well-being could justify an inequality-based claim to redistribution. While it is true that at time  $t_2$ , *B* is better off than *A*, it is also true, and more significantly so, that the two of them are, in fact, similarly situated over the time interval  $t_0$ – $t_3$ . Forcibly transferring resources from *B* to *A* at time  $t_2$  would actually be creating inequality, not mitigating it.<sup>78</sup>

Another way of analyzing the situation just described is to note that at time  $t_0$ , *A* and *B* were both faced with similar choice sets. Each was able to choose consumption at time  $t_1$  or to delay consumption until time  $t_3$ . Because both individuals were equally wealthy at time  $t_0$ , neither could complain that he was treated unfairly, even if his wealth was less than that of the other at a later point in time.<sup>79</sup>

Comparing various individuals' distributive shares in terms of

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76. This is not to say that other approaches to distributive justice would completely ignore the difference between needs and wants. Presumably, for example, a utilitarian would place primary emphasis on needs over wants, simply because the pleasure associated with the satisfaction of a need is quantitatively greater than the pleasure derivable from the satisfaction of a mere want. For needs-based justice, on the other hand, the distinction is not merely quantitative but qualitative; only needs are the basis of positive moral duties. While one is certainly permitted to consider other individuals' wants and to act so as to satisfy them, doing so would be considered, not the fulfillment of one's moral duty, but the performance of an heroic act.

77. For the purpose of this analysis, I will ignore such factors as individual *A*'s pleasant memories of his past consumption or his regret at having indulged his desire for immediate gratification and the psychological effects of individual *B*'s anticipation or impatience.

78. Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 285–93 (1981). I will assume that the choice to consume immediately was reasonable under the circumstances.

79. JULIAN LE GRAND, *EQUITY AND CHOICE: AN ESSAY IN ECONOMICS AND APPLIED PHILOSOPHY* 87 (1991).

similar choice sets is not necessarily equivalent to comparing their well-being over time. Consider, for example, the case of three similarly situated individuals who are faced with the opportunity to gamble. Individual *A* refrains from gambling, individual *B* gambles and wins, individual *C* gambles and loses. Whether one compares their situations on a time-slice perspective immediately after the payout or whether one compares their situations over a time interval which begins before the gamble and continues until *A* and *B* have both consumed their additional resources, the situations of the three individuals concerned are not equal. Having gambled successfully, *B* is by any reasonable measure better off materially than either *A* or *C*. Having refrained from gambling, *A* is, again by any reasonable measure, better off materially than *C*. If inequality itself were grounds for redistribution, *C* would appear to have a claim against both *A* and *B*, while *A* would have a claim against *B*.

Nevertheless, this inequality cannot be traced to any arbitrariness in the natural distribution. Each individual concerned was faced with equivalent choice sets. Neither *A* nor *C* can legitimately claim that that it is unfair that he has less resources at his disposal than does *B*, nor can *C* legitimately claim that it is unfair that he has less than does *A*.<sup>80</sup> Because *C* chose to gamble and *A* chose to refrain from gambling, any claim of unfairness voiced by either of them would appear to be disingenuous. In fact, from a choice-set perspective, the three are similarly situated. An approach to justice which views redistribution as a means of mitigating the arbitrary inequality inherent in the natural distribution—in other words, a choice-set, inequality-based approach to justice—would, therefore, see no need to redistribute resources from *A* or *B* to *C* or from *B* to *A*.

Although choice sets and equality over time are central to inequality-based justice, they are irrelevant from the perspective of a needs-based approach to justice. An individual's needs and her ability to meet those needs are relevant for needs-based justice. It does not matter how the individual concerned came to be needy.

Recall, for instance, the situation discussed above in which individual *A* consumed his resources at time  $t_1$ , while individual *B*, similarly situated to *A* at time  $t_0$ , delayed consumption until time  $t_3$ . Even though *B* is better off than *A* at time  $t_2$ , they are equal over time or over choice-sets, such that *B* would have no obligation towards *A* under an inequality-based system of justice. Nonetheless, if at time  $t_2$  *A* is needy and *B* is in a position to help, a needs-based justice would impose upon *B*

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80. Here, too, I am assuming that the decision to gamble was not unreasonable and that a reasonable person could have chosen to gamble the same as he could have chosen to refrain from gambling.



a moral obligation to come to *A*'s assistance. *B* may not shirk his moral responsibility by pointing to the fact that *A* consumed excessively at time  $t_1$  while *B* saved for the future.

Admittedly, this aspect of needs-based justice may be counterintuitive. *A*, after all, has no one but himself to blame for his predicament. He could have saved for the future, but he chose not to. By calling upon *B* to come to his assistance at time  $t_2$ , *A* is in effect asking *B* to subsidize his prior consumption at time  $t_1$ , when *B* was frugally ferreting away his wealth for the proverbial rainy day.

Responding to this argument requires consideration of the role of desert in a needs-based approach as opposed to its role in an inequality-based approach. Desert appears to play little or no role in either. Under a merit-based system, desert plays a central role: people get exactly what they deserve. Inequality-based and needs-based approaches, in contrast, consider obligations of distributive justice without reference to desert. Nevertheless, the position of desert in a needs-based approach is different, if only subtly, from its position in an inequality-based approach.

Ostensibly, desert is irrelevant for inequality-based systems of justice, which reject the concept that wealth and poverty are deserved and therefore seek to mitigate unequal distribution of resources. Nonetheless, desert occupies, in some ways, as important a position in inequality-based approaches as it does in merit-based approaches to justice. Inequality-based approaches go to great lengths to prove that distributional inequality is unrelated to any type of moral desert. They rest on the premise that because talents and social position are arbitrary from a moral point of view, distributive shares ascribable thereto are undeserved. They conclude that, with no claim of desert to material holdings, no one may legitimately object to their redistribution.

Ironically, this line of reasoning begins with a discussion of desert. Even though the discussion sets out to prove that notions of desert are inapplicable to distributive justice, striving so hard to do so merely emphasizes their significance. Were desert really immaterial, the question of whether or not talents and social positions were deserved would be irrelevant. By basing their arguments on the claim that no single person deserves his wealth, inequality-based theories appear to accept the meritocratic position that where claims of desert are substantiated, distributive share should follow. Egalitarianism is thus merely a special case of meritocracy, where desert claims are equal.

In needs-based justice, desert is a non-factor. Under needs-based justice, an individual who, although not needy, is worse off than another has no claim to share in that other person's wealth. Again, the reason is

not that his level of well-being is deserved; questions of desert are simply irrelevant. However, when a person is in need, others who are able to come to his aid at a non-prohibitive cost to themselves, yet ignore the need out of apathy or antipathy, are not fulfilling their moral duty. Here, too, the entitlement of the needy individual to assistance is not dependent upon the undeserved nature of his need; as before, desert is irrelevant.

Assume, therefore, that the person encountered by the desert traveler is there without water due to his own gross negligence. May the traveler, where the risk involved in saving the other is not prohibitive, choose inaction on the premise that the other has no one to blame but himself for the predicament in which he finds himself? Needs-based justice suggests that ignoring the victim's needs and letting him die would be immoral. When considering whether or not the desert traveler is morally obliged to save another person who is in desperate need of water, the responsibility of the victim for his predicament is not relevant.<sup>81</sup> Needs-based justice would therefore require the rendering of assistance, regardless of how it came to be that the individual concerned found herself in a state of neediness. If an individual is in need and cannot satisfy those needs, any other individual able to help is morally obligated to do so.

#### *B. Limitations on Needs-Based Justice Claims*

As previously noted, one exception to the moral imperative of assisting the needy is that an individual is not required to assist when the risks or costs involved are prohibitive. In addition to this exception, there are two other conditions for entitlement to assistance worth noting.

The first condition of qualifying for assistance under a needs-based justice scheme is that the person concerned is incapable of meeting those needs through his own efforts. A person who could work and earn enough money to supply his needs but chooses not to has no claim on others, including those who could supply those needs at little or no cost to themselves. This condition might, at first glance, appear to contradict the earlier assertion that desert is irrelevant for need-based justice: Part III.A contended that a person's responsibility for his own predicament

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81. For example, the past fiscal behavior of elderly individuals who are no longer capable of taking care of their own needs—where “taking care of their own needs” refers not to their physical state but to their economic state—would be irrelevant.

The irrelevance of desert for needs-based justice and the obligation to assist those in need whatever responsibility they bear for their own predicament is perhaps an argument for limiting the scope of needs and classifying anything much above sustenance level as a want. On the other hand, the fact that desert is irrelevant might be an argument in favor of expanding the definition of needs, as those who, through no fault of their own, are able to supply their own needs and nothing more are not entitled, under a needs-based approach, to redistribution.

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does not bar his redistributive claim, and this section contends that no one has the right to rely on others when he could rely upon himself. Nevertheless, the two situations are quite distinct.

A needy person is one who is incapable of supplying his own needs. Thus, by definition, one who is so capable is not needy. On the other hand, the fact that a person could have supplied his own needs had he acted differently in the past does not disqualify him from being needy, provided that at the present time he is no longer capable of supplying his own needs. Individuals have some measure of control over the present and the future; we cannot change the past. Our inability to affect the past manifests itself, for purposes of this discussion, in two ways. First, the needs to which needs-based justice refers are limited to present or future needs. A person's past state of well-being might be relevant for inequality-based approaches to justice, but it is irrelevant for needs-based justice. Needs-based justice can only operate in the present, incapable as we are of supplying past needs. Past needs cannot ground a claim for needs-based redistribution.

Secondly, an individual's past capability to provide for his future does not mean that that person is not needy in the present. Past conduct can ground an argument of culpability for present needs, but culpability is not relevant for needs-based justice and can be ignored. Assume, for example, that a person is earning a salary sufficient to supply his needs. At this point in time, he obviously cannot claim to be needy. If he quits his job, cutting off his only source of income, would he now be considered needy? The answer depends on the circumstances. Assuming that he could either get his old job back or find a new job, he does not meet the criteria of neediness. True, he has needs; but as long as he is capable of supplying those needs, he is not needy. Others who know of his predicament are under no obligation, individually or collectively, to come to his aid. If, however, he is incapable of supporting himself, he would meet the criteria. It might be observed that his lack of a job is his own fault, as he voluntarily gave up the job he had. In fact, assume that he had no justification for quitting his previous job and, furthermore, that he did so with full knowledge that he would not be able to get another one. In other words, for the sake of argument, assume that he is fully culpable for his present predicament. Nevertheless, at this stage, there is nothing he can do about it *ex hypothesi*. Thus, even if he is fully culpable for being in a position where he can no longer meet his own needs, he would nevertheless be entitled to assistance.

The second condition is that even one who is in need and is incapable of supplying that need himself has no needs-based claim unless his needs are capable of being supplied. Although this condition may

appear too obvious to mention, it will prove necessary for our future discussion.

C. *“Lazy or Crazy”*

The theory of justice hitherto described is strongly rooted in widely-held intuitive conceptions of moral duty. To demonstrate, let us consider the reactions people typically have to the problem of homelessness and, specifically, what they consider their own obligations toward the homeless to be.

People who are not homeless often feel uncomfortable with the idea of homelessness. The discomfort may be rooted in a conflict between what people believe to be right and what they perceive to be in their own self-interest.

On the one hand, people instinctively feel that, individually or collectively, they should do something about the problem of homelessness. The feeling that one should help the homeless is rooted in the idea of needs-based justice. Homeless people have needs which are not being met, and many people intuitively feel that although they are not personally responsible for the plight of the homeless, they have a responsibility, if they can, to come to the aid of the homeless. This feeling of responsibility is not based on the urge to mitigate economic inequality; rather, it is based on their sense of morality

On the other hand, helping out the homeless often operates against what people perceive as their own economic self-interest. They may, therefore, intentionally avoid those areas where they are likely to confront homeless people. Additionally, they often rationalize their inaction, and these rationalizations may help expose their underlying belief structure. The possibility that the homeless person is simply someone who is down on his luck is the greatest psychological challenge to those attempting to rationalize inaction and is consequently rejected out of hand. Homeless people, it is often claimed, are “either lazy or crazy.” Thus, the rationalization for not coming to the aid of the homeless is that people who are lazy are not really needy; they can help themselves, so there is no need for others to come forth and help them. People who are crazy are beyond help; there is nothing we can do to help them because whatever we give them will be squandered anyway.

This “lazy or crazy” rationalization reveals some important points regarding the underlying belief structure. Firstly, someone who is in need deserves help. Were this not the case, no rationalization would be necessary. Secondly, the only good reasons for not coming to the aid of one in need are either (a) he is not truly needy, as he is capable of

supplying his own needs, or (b) he is beyond help, such that attempting to supply needs is a waste of effort.

The “lazy” part of the rationalization does not indicate that desert intuitively plays an important role in issues of justice. The emphasis is on the fact that the individual concerned is, at present, capable of doing something about his situation and that he therefore has no right to ask others to supply his needs. As previously noted, the difference between denying aid because the person is capable of supplying his own needs and denying aid because the person is responsible for his own predicament has demonstrable consequences when referring to past actions.

Assume that an individual is incapable of working to supply his own needs because he was seriously injured in a skiing accident. Assume further that the individual was uninsured and undertook the risk in full knowledge of the potential consequences. The person concerned is both needy and responsible for his state. An inequality-based or choice-based approach to justice might deny him any relief on the grounds that he is not entitled to compensation from those who refrained from skiing or who purchased insurance to protect them in case of an accident—in other words, those who refused to gamble—or from those who, although uninsured, enjoyed the skiing and escaped the injury—those who gambled and won. Nevertheless, the rationalizations for refusing to aid the needy do not normally include such sentiments as “he gambled and lost.” People are ordinarily willing to allow the consequences of gambles to affect well-being, but not to the point of denying people their needs.

People’s attitude toward the homeless, including the justifications they adopt for refusing to render assistance, provide convincing evidence that needs-based justice is strongly rooted in our intuitive sense of what is right. We instinctively feel that neediness, whatever its cause, must be addressed.

#### *D. Economic Effects*

Until now, this Article has ignored the possible economic side effects of granting assistance to the needy. When considering the simplified cases of individual *A*, who is in need, and individual *B*, who is capable of satisfying that need, economic effects are irrelevant. The concept of neediness, as previously noted, excludes those who are capable themselves of satisfying their needs. Thus, describing *A* as needy is operating under the assumption that *A* is incapable of satisfying his own needs, whether or not *B* comes to his assistance. *B* could not therefore justify his refraining from rendering the requisite aid on the grounds that

lending aid would discourage *A* from helping himself. Thus, the only possible scenarios are (1) *B* helping to meet *A*'s needs and (2) *A*'s needs being unmet.

Institutionalizing such a scheme, however, might encourage individuals to take greater chances than they ordinarily would and to rely on the safety net of needs-based justice to limit their risk. Of course, this is not to say that all or even most individuals would dramatically change their behavior in response to the institutionalizing of the principles of needs-based justice. People whose welfare level is considerably above the level of neediness will most likely act to protect themselves from falling to that level. They have a strong incentive to allocate the necessary funds for medical insurance, retirement, and so forth in order to avoid neediness. Their knowledge of the existence of the safety net might not play a serious role when the level to which they will be allowed to fall before being entitled to assistance is considerably below the level to which they have been accustomed.

On the other hand, for individuals who are barely above the level of neediness, the limitation on risk might significantly affect their decision-making process. When calculating the possible outcomes and the chances of the various outcomes occurring, the fact that their needs will always be met may encourage some individuals to undertake a particular course of action that would not otherwise be worth the risk. This is particularly true with regard to insurance and savings. Where the option of relying on the safety net is real, the incentive to insure or to save is correspondingly reduced.

The extent to which the institutionalizing of needs-based justice would actually affect behavior is an empirical question beyond the scope of the present discussion; the normative issue, however, can be discussed. Assuming that the institutionalization of needs-based justice would, in fact, cause an increase in the number of individuals who would not be able to take care of their own needs, the normative question is how this fact might affect the obligations inherent in needs-based justice. These obligations, as previously discussed, can only be limited if (a) the individual concerned is capable of providing for his needs and is therefore not truly needy, (b) the needs of the individual concerned are incapable of being met, or (c) the risk or cost involved are prohibitively high.<sup>82</sup> The mere fact that providing for the needy is likely to lead to an

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82. Could there not be other concerns, outside these three limitations, which would justify a refusal to assist? While it is ordinarily difficult to prove an assertion that there are no other legitimate concerns, it nevertheless appears to me that these are the only limitations which needs-based justice could support. If someone is needy (limitation (a)) and his needs are capable of being met (limitation (b)) at a non-prohibitive cost (limitation (c)), it is contended that assistance must be rendered.

increase in the number of individuals who are incapable of satisfying their own needs would not, therefore, be relevant unless such increase could trigger one or more of the specified conditions.

If the increase in the number of needy individuals is moderate, such that others could continue, albeit at a greater cost to themselves, to supply those needs, the obligation to assist is irresistible. In other words, human society cannot say to needy individual *A*, “I refuse to come to your assistance, even though you are needy and we are capable of supplying those needs, because if we were to do so, individual *B* might soon become needy too and would also require assistance,” provided that society is, in fact, capable of supplying the needs both of *A* and of *B*. The fact that a third party may decide to modify his behavior in a way inimical to the interests of one who is called upon to fulfill his moral duty cannot justify a breach of that duty.<sup>83</sup>

However, the situation may be qualitatively different when the economic effects are more severe. Consider a scenario in which the institutionalization of needs-based justice would encourage a great number of individuals to gamble away their ability to satisfy their own future needs. Assume further that the projected number of individuals who would become needy as the result of such a disincentive is so great that the total assistance required would be prohibitively costly and that at least some of the needy will not have their needs met. Society would then confront the dilemma of satisfying present needs at the cost of meeting future needs. Society simply would not be able to provide for all needs, whether present or future. In such a case, society could decide that not supplying present needs is the lesser of two evils.

Even in such circumstances, though, the extent to which assistance is withheld from the needy must be kept to a minimum. Every denial of assistance to an ostensibly entitled individual must contribute to prevention of more neediness in the future. Thus, it might be legitimate in such cases to discriminate between those who bear responsibility for their present state of neediness—in other words, those whose present state of neediness is the result of their own past actions—and those who could not have reasonably prevented it. The reason is not that those who

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83. Recall the case of the desert traveler. Assume that giving water to those who need it would encourage others to wander in the desert without sufficient water supplies. As long as the traveler has enough water to supply her own needs, refusing to come to the aid of those in need would still be immoral.

However, as the text goes on to argue, where the amount of water carried by the traveler and by others like her is likely to prove insufficient to meet the needs of all those they encounter wandering in the desert without water and where the only way to prevent people from putting themselves in such a predicament is to refuse water to those who need it, the refusal might be considered a moral course of action.

bear responsibility for their neediness are any less needy or that they deserve their neediness. The reason that assistance may be denied is strictly utilitarian: the disincentive effects of providing assistance can only impact those for whom positioning themselves to be able to satisfy their own needs in the future is a realistic possibility. Thus, if it is known that only those not responsible for their predicament will be entitled to assistance, individuals capable of securing the means to satisfy their own needs will not be encouraged to neglect their future needs. Distinguishing between the two may, of course, prove impossible in practice.

It should be emphasized, however, that denying assistance to the needy must be considered a last resort. If, for example, society's resources are threatened with being stretched beyond capacity, it would be preferable to continue to provide for the needs of all the present needy and to announce that all those whose future actions or omissions—or, better yet, specified acts or omissions—render them needy will not receive assistance or will be entitled to a reduced level of assistance. If such a declaration of intent is credible, it may be able to avoid the disincentive effects and still allow the satisfaction of present needs.<sup>84</sup> Alternatively, it might be reasonable to institute a mandatory social security scheme, which would insure individuals against neediness due to injury or retirement.

An additional economic effect that must be taken into account is the impact of the redistributive scheme on the behavior of those who would be called upon to render the assistance. Supplying the needs of those incapable of doing so themselves would presumably be financed through taxation. Higher taxes, however, serve as a disincentive to productive economic activity, and reduced economic activity means fewer resources available for assisting the needy. In other words, the heavier the tax burden, the more quickly the cost of providing for the needy is likely to prove prohibitive.

Thus, in determining whether the costs of providing assistance are prohibitively high, the question of how the granting of assistance will affect people's future behavior cannot be ignored. If institutionalizing a scheme of assistance would, in time, overwhelm society's capacity to assist the needy, limiting the circumstances in which aid is rendered would be justified. The imperative of providing for present needs must

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84. Of course, there will still be individuals who will continue to risk their ability to care for their own needs where the potential reward is, in their mind, sufficiently great, or where the chance of losing the gamble seems sufficiently small. Under the hypothetical of stretched resources, the denial of assistance to those individuals will be necessary to maintain the credibility of the institutional mechanism.



be balanced against the threat of not being able to meet future needs.

*E. Justice and Altruism*

An important point to consider is whether the implementation of needs-based justice would exhaust human capacity to create a better world. Ostensibly, the answer to this query would be negative. Consider a world in which the principles of needs-based justice were fully realized. The distribution of wealth might still be very unequal. Assume, therefore, that a relatively wealthy individual decides to distribute some of his wealth to those less fortunate than he. Needs-based justice does not require him to do so, as *ex hypothesi*, all satisfiable needs have already been met. Nevertheless, he recognizes that he is no more deserving of wealth than others and wants to share what he has. Alternatively, he may feel that although he does deserve his wealth, others, due to the presumed decreasing marginal utility of material goods,<sup>85</sup> might derive greater benefit from his holdings than he could.

Most people would probably feel that the action described would be admirable. Most people would probably feel that a world in which wealthy people were more generous and more willing to share their wealth with others less well-off would be a better place to live. In fact, most people would probably feel that a world in which wealth were more equally distributed would be better than one in which it were distributed less evenly. In fact, it is difficult, with the framework of modern philosophy, to argue that unequal distribution of wealth is a goal that society should pursue.<sup>86</sup> Such being the case, it would seem that even after the principles of needs-based justice had been fully implemented, there might still be room for improvement as far as distribution of economic resources are concerned. Why, therefore, should we consider the demands of distributive justice to be satisfied when needs are satisfied? Why not include within the demands of justice whatever would make the world a better place in which to live?

The reason to prefer a less extensive definition of justice is that there is a fundamental difference between aspiring to a better world and using the coercive power of government to achieve that end. Working toward a world in which people are more generous, kind, compassionate, and caring is an eminently worthwhile goal. Most people would prefer a world in which such virtues were prevalent. But legislating generosity

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85. It is normally presumed that the more material goods one has, the less satisfaction one derives from a given increment.

86. Cf. HENRY C. SIMONS, PERSONAL INCOME TAXATION 3-4 (1938) (explaining the tax structure in pre-Revolutionary France).

and kindness is an exercise in futility. Coercion can only help in regulating the most blatant violations of those virtues. Assault, trespass, theft, and libel can be legally proscribed, unfriendliness cannot. Therefore, the fact that a certain act is widely considered desirable or admirable does not mean that requiring the performance of that act against the will of the individual concerned is necessarily a step in the right direction.<sup>87</sup>

The inability to coerce what is generally perceived as positive behavior is not confined to needs-based justice. It is endemic to most, if not all, conceptions of distributive justice. To demonstrate the limits of coercion, consider Rawls's difference principle, the most extensive rational redistribution scheme possible.<sup>88</sup> As inequality is permitted only to the extent that it serves the interests of the worst-off; any further equalization of wealth beyond that which is dictated by the difference principle would be detrimental to those very interests that the redistribution was meant to promote.

Nevertheless, the difference principle could still result in vast discrepancies in wealth. For example, where the imposition of high rates of tax on highly skilled individuals would result in them curtailing their activities to the detriment of society as a whole—and to the detriment of the worst-off members of society in particular—Rawls would condone allowing them to retain a greater than average share of wealth.

Furthermore, in the likely case that it would prove impossible to determine the marginal net compensation which would induce the optimal exploitation of each particular individual's talents, the difference principle would presumably allow whole classes of individuals to retain disproportionately large distributive shares, as long as increasing the tax rate on that class of persons would impact negatively on society's worst-off members. Despite the resulting, potentially vast, inequality of wealth, no state-imposed scheme of redistribution could be more protective of the interests of the least well-off.

Assume now that members of a well-off class decide to donate some of their relatively extensive wealth to those not as well-off. Most people, including Rawls, would probably view such an altruistic act positively. Besides being generous and fostering a sense of community, it would create a distribution of resources superior, from a Rawlsian perspective,

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87. Cf. Alexander McCall Smith, *The Duty to Rescue and the Common Law*, in *THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 55*, 55 (Michael A. Menlowe & Alexander McCall Smith eds., 1993) ("[T]here are many moral precepts which are not legally enforceable." (quoting *Malone v. Metro. Police Comm'r*, (1979) 2 W.L.R. 700 (Ch.)).

88. Rawls's difference principle, it should be noted, is not synonymous with domestic Rawlsianism. As discussed in *supra* Part II, limiting a redistribution to the inhabitants of a single country cannot be justified in terms of the difference principle.

even to that which could be brought about by the implementation of the difference principle itself. Society, of course, cannot require such behavior. Due to the overall economic effects, it would be counterproductive to do so.<sup>89</sup> Society can do no more than simply stand on the sidelines and applaud when individuals, from their own inner convictions, perform acts of altruism voluntarily.

Thus, the difference principle, as extensive as it is, is not the last word in redistribution. No distributive principle can be. Any distributive principle must leave room for voluntary acts of redistribution beyond the limits of what justice can rationally impose.

#### IV. GOING BEYOND THE REQUIREMENTS OF JUSTICE

Requirements of justice know no geographic boundaries. If justice requires the alleviation of need, then alleviation of need is required wherever it may be found. Except where the existence of an international border poses an impediment to assistance, its existence is irrelevant for purposes of justice.

The question which now arises is whether, in regulating its internal affairs, a country may go beyond the requirements of justice. It may not, of course, adopt a regime which falls short of satisfying the requirements of justice, which are as applicable within a country's borders as they are without. Those who are needy are entitled to assistance from all who are able to supply it. The question is whether, having satisfied both its internal and external obligations, a country may adopt a tax regime whose purpose is to redistribute wealth domestically beyond what justice demands.

An individual, having satisfied the obligations imposed upon him by justice and being free to do with his holdings as he pleases, who decides to go beyond the demands of justice by transferring part of his holdings to others less well-off would be considered heroic and his act commendable. It might, therefore, appear that a nation that exceeds the demands of justice by instituting an internal redistribution scheme should be commended for doing so. However, when an individual goes beyond the demands of justice, he is choosing to waive his own use of resources for the purpose of benefiting others, even though he is not obliged to do so. Thus, were every individual in the country to participate voluntarily in the redistribution, there would be no question as to the legitimacy of the scheme. Yet redistribution is rarely a voluntary scheme. Redistribution ordinarily involves the forcible transfer of wealth from

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89. RAWLS, *supra* note 1, at 151.

some individuals to others. Thus, it is necessary to determine from what source a country derives the right to take from some of its citizens in order to give to others.

### *A. National Cohesion*

An argument can be raised that redistribution contributes to national cohesion and fosters a sense of interdependence: compatriots, whether they like it or not, share a common political destiny.<sup>90</sup> The fates of all individuals and of all groups in a society are ultimately intertwined. Furthermore, the nation is an essential vehicle for the creation and transmission of culture, and national affiliation is central to most individuals' self-definition.

It might be claimed that excessive inequality weakens the bonds which hold a society together. Redistribution of wealth reinforces feelings of solidarity and allows the state to serve as a vehicle for promoting the economic, cultural, and social interests of its members. Furthermore, when a country finds itself in conflict with other countries, national cohesion can be crucial to achieving national goals.

Nevertheless, the question remains as to why redistribution is legitimate. However lofty the goals of internal redistribution and whatever its contribution to generating feelings of national fraternity, why demand that the cost of establishing such interdependence fall on some when the advantages are to all? Even assuming that redistribution would positively impact national cohesion and further national goals, simply pointing out the overall benefits of a certain course of action cannot justify the imposition of a tax to transfer the wealth of some to others. If the benefits of national cohesion accrue to the nation as a whole, then it would seem that the cost should similarly be borne by all.

### *B. Relative and Absolute Need*

When defining their needs, people are affected by their knowledge of what others have. What is considered a need in one part of the world might be classified as a want, a luxury, or even an extravagant overindulgence in another part of the world. Thus, it might be argued that a "need" is not an absolute but rather a relative concept. Accordingly, international justice might be thought of as requiring the satisfaction of only basic needs, and countries whose local definition of need is higher would be tasked with instituting internal redistribution.

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90. TAMIR, *supra* note 9, at 117.

The relative need argument, attractive as it is, appeals to conceptions of inequality-based justice and not needs-based justice. The fact that others having more might make one dissatisfied with what one has is an argument for redistribution based upon inequality or, perhaps more precisely, perceptions of inequality. It does not, however, substantiate a contention that one who is faced with a higher standard of comparison is more needy than one who is not. In needs-based justice, alleviation of envy is not considered a need. Under a needs-based approach to justice, the “merely rich” do not have a claim of redistribution against the “super rich.” The fact that the standard of comparison established by the super rich may cause feelings of inadequacy, envy, and dissatisfaction among the merely rich is irrelevant.

People’s tendency to compare their own standard of living with that of others around them is, in any case, a problematic justification for redistribution that would be required, not by the inequality per se, but by awareness of the inequality. Ignorance could, therefore, substitute for redistribution, and hiding the standard of living enjoyed by the wealthy would apparently satisfy claims of justice. Consider also what would happen if the lifestyles of the wealthy, despite their attempts to avoid exposure, were revealed to the less well-off public. Who would be responsible for the ensuing dissatisfaction: the wealthy, whose standard of living is the focus of the dissatisfaction, or those who brought it to the attention of the public at large?<sup>91</sup>

What others have, or the perception of what others have, cannot serve as basis for claims under needs-based justice.

### *C. Benefit Theory*

Benefit theory—the idea that the tax an individual pays should reflect the benefit he derives from public services—has served as an attempted justification for a redistributive tax structure.<sup>92</sup> It is claimed that because one of the primary functions of government is the protection of wealth, the wealthy should bear the greatest share of the costs of providing those services.

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91. I am assuming that the wealth referred to was acquired legitimately, so that, aside from establishing a basis for comparison, it is unobjectionable. By way of comparison, one who divulges that the wealth of an individual or of a class of individuals was acquired in violation of the norms of transactional or compensatory justice does not contribute in any way to the injustice; ignorance of injustice cannot serve as a remedy. A world in which victims of transactional or compensatory injustice are ignorant of the violation of their rights is not more just than a world in which they are aware of the facts. The situation described in the text is different. The claim being considered is that knowledge of the lifestyles of others is what creates the injustice.

92. EDWIN R.A. SELIGMAN, *PROGRESSIVE TAXATION IN THEORY AND PRACTICE* 190–202 (2d ed. 1908).

Tax theory, however, has long recognized that relying on benefit theory to justify a progressive tax structure is problematic. It would require proof, not only that the rich receive greater benefit from government services, but also that the benefit increases at a greater rate than does their wealth. It is far from obvious that this is actually the case. John Stuart Mill, for example, contended that benefit theory would result in a regressive tax structure, with the weakest elements of society being the most dependent upon government protection.<sup>93</sup>

A related problem concerns financing assistance to the poor. Henry Simons, for example, argued that using benefit theory to allocate the cost of redistribution is a contradiction in terms.<sup>94</sup> Financing transfer payments by charging the recipients would, of course, undermine the purpose of the exercise. Similarly, if the government were to establish soup kitchens to feed the poor and then charge each person who entered an amount equal to the benefit received, it would no longer be providing welfare services but simply operating a commercial diner.

In effect, benefit theory is founded on the principle that anyone who benefits from government services without paying for them is unjustly enriched at the expense of his fellow taxpayers. Its goal is to prevent any disturbance of the pre-existing distribution. Benefit theory is, therefore, the antithesis of redistribution.

Another benefit theory argument for redistribution is based on the contention that the true motive for redistribution is not concern for the welfare of the poor but, rather, a desire to protect the privileges of the wealthy.<sup>95</sup> To enjoy their holdings, the wealthy require social stability, which could be threatened when vast disparities in wealth create wide-scale dissatisfaction with the socio-economic structure. The rich thus have an interest in redistributing wealth to the extent necessary to keep discontent below the threshold of civil unrest.<sup>96</sup>

While the argument presented is not, perhaps, unfounded, it is

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93. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY AND CHAPTERS ON SOCIALISM* 156–57 (Jonathan Riley ed., Oxford Univ. Press 1994) (1848); *see also* SELIGMAN, *supra* note 92, at 156–202 (indicating that benefit theory has been used to justify progressive, proportional and regressive taxation).

94. SIMONS, *supra* note 86, at 4.

95. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 20–21, 38 (2d ed. 1993) (1971).

96. *But see* JOHN STUART MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 73 (E.P. Dutton & Co. 1951) (1861) (“[In accordance with some conceptions of benefit theory,] all should pay an equal capitation tax for the protection of their persons (these being of equal value to all), and an unequal tax for the protection of their property, which is unequal.”). Note also that very wealthy individuals often have the means to protect themselves and thus benefit less from redistribution than do members of the middle class, who are often the first victims of a breakdown of the social order.

nevertheless problematic. As already noted, benefit theory is fundamentally anti-redistribution. Only after all legitimate claims have been satisfied could benefit theory be called upon to prevent a disruption of what would now be a just distribution. Thus, in order to consider benefit theory, it must be assumed that all just claims to redistribution have already been satisfied. Given this assumption, the threat to disrupt the present distribution is inherently unjust. It is a threat to take by force the legitimate holdings of another.

Paying another person not to use illegitimate force to threaten one's holdings is the moral equivalent of succumbing to a protection racket. While yielding to the threat may be the most prudent course of action, a more principled response—and one which could prove more cost-efficient in the long run—might be to defend oneself by allocating more resources to the protection of life, liberty, and property.<sup>97</sup> Ostensibly it is those whose lives, liberty, and property are at risk who should bear the costs of the protection. Those who pose the threat gain no benefit from measures undertaken to defend against it.

Nevertheless, the conclusion that only those who desire protection should pay for it is questionable, as it would seem to follow that criminals, deriving no benefit from law enforcement, would be relieved of the burden of paying for it through special tax breaks, a result which is patently absurd.<sup>98</sup> In fact, compensatory justice would seem to demand the opposite result. Whereas criminals are the ones who create the necessity for law enforcement on the rest of society, they, more than anyone else, should pay for it. Similarly, if one group in society is illegitimately threatening the well-being of another, it would seem that the cost of defending against that threat should be borne by the former. Thus, applying this reasoning to the welfare benefits, the cost of maintaining the social order would apparently need to be paid for by the less well-off, who are ostensibly threatening the legitimate wealth of the rich.

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97. WALDRON, *supra* note 19, at 265.

98. The question of whether the profits of criminal activity should be subject to taxation was, in the past, a subject of controversy. See *James v. United States*, 366 U.S. 213 (1961); *Rutkin v. United States*, 343 U.S. 130 (1952); *Commissioner v. Wilcox*, 327 U.S. 404 (1946), *overruled in part by James*, 366 U.S. 213. To the best of my knowledge, however, no one has ever raised the claim that criminals should be exempt from taxation because they derive no benefit from law enforcement.

While traditional attempts to ground redistribution on the benefits supposedly received by the wealthy from the existence of the state or from its protection of their fortunes are unconvincing, benefit theory should not be disparaged of in this context. It is possible to construct a benefit theory type of argument to justify a relatively extensive domestic redistribution.

*D. Benefit Theory and Sentiment*

As discussed earlier, more concern is ordinarily shown for the fate of compatriots than for the fate of foreigners. The reason for this unbalanced concern might be found in humanity's tribal origins and its primitive survival mechanisms. Whatever the cause, people do tend to care more about their compatriots than they do about foreigners and are ordinarily more willing to lend a hand when the well-being of their compatriots is concerned.

Let us therefore assume that raising the welfare level of the less well-off members of a given society—even if the needs of the worst-off have already been met—is something members of that society would tend to view favorably.<sup>99</sup> Assume, in other words, that people would prefer to live in a society in which economic resources are distributed more fairly. In such a case, raising the welfare level of the less well-off and mitigating economic inequality would constitute a psychological benefit to the members of that society. By the terms of benefit theory, imposing a tax to finance the provision of that benefit is, therefore, wholly justified.

Of course, one may question why it would be necessary to impose a tax in order to finance the redistribution if all members of the society concerned were interested in mitigating inequality beyond the strict requirements of justice. Why could the society not achieve the desired state of affairs through voluntary transfer payments? After all, when sentiment moves one to give gifts to family members or to friends, one simply does so; the impulse driving such sentiments does not need to be enforced by government action.

However, relying on voluntary contributions to finance action, the benefits of which cannot reasonably be limited to contributors, raises issues of both efficiency and fairness. This Article has assumed that all members of the society concerned are interested in the mitigation of economic inequality beyond the dictates of distributive justice. Nevertheless, one would have no economic incentive to contribute,

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99. In Part IV.E *infra*, I will consider what happens when this assumption is relaxed.



unless he were convinced that the redistribution would be fundamentally curtailed without his contribution. The psychological advantage of living in a more equal society accrues to all, whether or not they contribute to the redistribution.<sup>100</sup> In a society as large as a modern country, where the impact of any single individual's contribution is negligible, no one would have an economic incentive to contribute. Although the project might be economically efficient—in other words, the cost to each individual could be set at less than the psychological benefit that would accrue to him—the inability to exclude free riders from enjoying the advantages of the redistribution would prevent what could have been a Pareto improvement.<sup>101</sup> Even if it were possible to finance the project through voluntary contributions, it seems unfair to allow some to rely on the civic-mindedness of others and, despite not contributing to the cause, to enjoy the same benefits as those who did contribute. While a variety of reasonable formulae for imposing financial burdens may be proposed, it would appear that distribution of the burden in accordance with a person's level of social consciousness is not among them.

Redistribution beyond the supplying of needs can therefore be justified not in terms of distributive justice but, rather, in terms of transactional justice. The dictates of global distributive justice are satisfied when essential needs are met. In acting to promote the goal of redistribution beyond what is required by the dictates of justice, the government is providing a service that the market is incapable of doing efficiently. Imposing a tax to finance the redistribution is merely charging taxpayers for the psychological benefits accruing to them.

Admittedly, no taxpayer contracted with the government to receive the service in exchange for a fee. Strictly speaking, then, there is no transaction and no place for transactional justice in the classic sense of the term. However, benefit theory steps in to fill in the gap. Where the market is incapable of operating efficiently, benefit theory holds that the government may provide the service and then charge each taxpayer according to the benefit he or she derived from that service.<sup>102</sup>

Until now, this Article has assumed that all members of the society

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100. Although we have assumed that everyone supports the goal of a more economically equal society, we may also assume, human nature being what it is, that most people would prefer that somebody else pay for it.

101. A Pareto improvement is a change which leaves at least one individual better off and leaves no one worse off: VILFREDO PARETO, *MANUEL D'ECONOMIE POLITIQUE* 617–18 (1909), translated in T.W. HUTCHISON, *A REVIEW OF ECONOMIC DOCTRINES, 1870–1929*, at 225 (1953).

102. Cf. NOZICK, *supra* note 1, at 93–95 (Even if a person benefits from a service, he is not obliged to contribute toward its maintenance unless he agreed to do so. “One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this.”).

in question are interested in redistribution beyond the dictates of distributive justice. Assume now that some individuals are indifferent to the issue of economic inequality and that mitigating inequality or improving the lot of the worst-off does not accord any psychological benefit to some members of the relevant society. These individuals could argue that because they derive no benefit from such activity, and because we are not dealing with alleviating needs, the government has no right, under the terms of either transactional or distributive justice, to require them to help pay for it.

The real issue is one of quantifying the benefits each individual receives, and allowing that some members of society derive zero satisfaction is merely a limiting case. According to benefit theory, one who derives great pleasure from the service should pay a lot, one who benefits less should pay correspondingly less, and one who derives no benefit should not be called upon to contribute at all. However, quantifying benefits will often prove impossible in practice.<sup>103</sup> For example, how much does any particular individual benefit from public parks?<sup>104</sup> How much does any particular individual benefit from a parade down Main Street? How much does any particular individual benefit from knowing that the society of which he is a member is concerned with the welfare of the disadvantaged? There seems to be no realistic alternative to estimating, based on objective criteria, the extent to which individuals will benefit or have benefited from government-supplied services.

Implementing benefit theory, whether with regard to national defense, environmental protection, or welfare assistance, necessarily involves a great deal of estimation, much of which is probably inaccurate. Nevertheless, unless one is willing to abandon benefit theory altogether, acting on conjecture is unavoidable. Therefore, where it seems reasonable to assume that most of those members of society who would be net givers under a proposed scheme of welfare assistance would derive psychological benefit from its implementation, benefit theory can be relied upon to justify the imposition of tax to

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103. It may be difficult or impossible even to estimate the overall benefit to society. In many cases, therefore, we simply estimate the benefit, compare it to the cost, and proceed accordingly. The democratic political process may be viewed, in part, as an admittedly very crude way of estimating the benefits of proposed actions relative to their costs. The greater the number of people who favor a certain course of action, the more likely it may be that the benefits to be derived from that course of action exceed the cost.

104. I am not including here situations in which it is possible to fund the activity through user fees, such as by charging admission to public parks. I am referring to situations where it is unrealistic to charge for admittance or where even those who do not actually enter the park nevertheless benefit from its existence.

finance that assistance.<sup>105</sup>

*E. The Limits and Consequences of Benefit Theory Redistribution*

What happens when there is little or no interest in an economically more equal society? In other words, what happens when the cost of providing assistance beyond the level of need is greater than the total psychological benefit which comes from living in a society which takes better care of its worst-off members than is morally required? In the situation described, redistribution would be unjustified. Distributive justice has already been satisfied. Transactional justice would not permit the redistribution, since the price the government proposes charging the taxpayer for the service is presumed to be greater than the expected benefit.

Redistribution is, of course, not an all or nothing affair. Willingness to fund up to but not beyond a certain level can be traced to the familiar convergence of two economic trends: diminishing marginal return and increasing marginal cost. From the perspective of the net donors, the psychological benefit of redistribution may be subject to the law of diminishing marginal utility because doubling the assistance given to the poor may not produce twice the amount of satisfaction for the net donors. Furthermore, taxes extracted to fund the redistribution are likely to impose an increasingly heavy burden on the taxpayer. At some point, the cost of funding the redistribution will equal and then outweigh the psychological benefit it brings. Until that point, benefit theory can provide the basis for a system of tax and transfer. Beyond that point, taxing for the purpose of redistribution is no longer legitimate.

The extent of redistribution, determined by the caprice of society's "haves," may appear at first glance strange or even demeaning. Why should the distributive shares of society's disadvantaged depend upon the generosity felt by their more affluent compatriots? Could it be that the obligations of redistribution will vary from society to society merely due

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105. To forestall an objection that taking from those who genuinely oppose the policy would nevertheless be tantamount to theft, it might be helpful to phrase the argument in procedural terms. Consider the civil justice system. The possibility that the plaintiff will unjustly succeed is an accepted facet of the system. In ordinary cases, for example, all that is required to succeed is a preponderance of evidence. Nevertheless, lacking the omniscience necessary to determine who is entitled to what, we have no option but to rely on the available evidence, incomplete as it may be. Furthermore, the presentation of evidence may be barred when the cost or potential harm of doing so is significant enough.

Similarly, the principle that only those who support a policy should have to pay for it may be considered a substantive rule whose implementation is subject to procedural criteria. Where a good faith effort is made to determine people's actual predilections, any inaccuracy may be regarded simply as a regrettable consequence of our lack of omniscience.

to the personal preferences of the wealthier among them? Would it not be more intellectually compelling to propose a rule delineating the extent of redistribution that members of a society would be morally obliged to follow, whatever the personal preferences of the wealthier among them?

To be sure, there cannot exist an objective set of criteria for internal redistribution. For argument's sake, assume that it were possible to formulate a rule for internal distribution that every society was bound to follow. The rule would specify the extent to which economic inequality would be subject to mitigation. It might adopt a strict Rawlsian approach that mandated, for example, that inequality should be mitigated to the extent that any further equalization would adversely affect the well-being of the least well-off. It might simply delineate the rate of taxation which should be imposed for the purpose of funding transfer payments and/or the provision of services to the less well-off. In any event, the same degree of inequality mitigation would almost certainly result in a greater absolute benefit to the less well-off in wealthier countries than in poorer countries. In other words, the primary beneficiaries of any "share the wealth" program would likely be those poor individuals who happen to live in rich countries. Similarly situated individuals living in poor countries would benefit less, simply because there would be less wealth to share.

Nationality is, as discussed previously, an undeserved and morally arbitrary attribute which cannot substantiate a claim to distributive shares. Any such claim must be nationality-neutral. And yet, any rule providing for an internal sharing of the wealth would necessarily differentiate on the basis of nationality and apportion claims accordingly. Similarly situated individuals could fare very differently in different countries; one might be a net receiver of transfer payments while the other was a net donor, simply because one occupied a lower than average economic position in his country, while the other, with identical absolute wealth, occupied an above-average position in hers. As our previous discussions have shown, no rule of justice could dictate the allocation of distributive shares merely on the basis of nationality.<sup>106</sup> Therefore, internal redistribution must be based not on any rule of justice, but upon feelings of national fraternity prevalent in that society. The level of justifiable redistribution would be dictated by the degree of fraternity.

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106. This is not, of course, meant to imply that nationality could never be a factor in determining distributive shares. For instance, were geographical or political obstacles to prevent the rendering of assistance to residents of a particular country, refraining from rendering such assistance might not be unjust. Nevertheless, the nationality of the individuals who would otherwise be entitled to assistance is not the controlling factor. While it may be true that the objective obstacles may only apply to individuals of a particular nationality, justice condones the withholding of assistance, not because of the nationality, but because of those objective obstacles.

Predilections can, of course, change. People may sometimes be more willing to share their wealth than they are at other times, as evidenced in democratic countries by election results that indicate varying levels of sympathy for redistributive efforts. The degree of internal redistribution that a country institutes will likely fluctuate over time, reflecting public attitudes to the extent to which a society's policymaking process incorporates those attitudes. Under the rules of distributive justice, such shifts cannot be considered normative. They can only be viewed as moving society closer to or farther away from some ideal distributive model.<sup>107</sup> When society recognizes its moral obligations and acts accordingly, the institutions will approach the ideal.<sup>108</sup> When distributive obligations are ignored due to ignorance, greed, or other factors, the gap between what institutions do and what they are supposed to do will widen.

In accordance with needs-based justice, both national and international institutions are required to operate so as to satisfy needs where doing so is not prohibitively risky or expensive. A society acts illegitimately if it does not establish the institutions necessary to satisfy its obligations towards either its own needy members or towards foreigners, regardless of whether the failure to do so is a result of ignorance of its obligations or because of an unwillingness, for whatever reason, to fulfill them. Whatever its procedures for determining how it acts, it has no more right to decide to refrain from fulfilling those obligations than it has the right to decide to take by force wealth which legitimately belongs to others.

However, once obligations of distributive justice have been satisfied and further redistribution proceeds under the jurisdiction of benefit theory, there is nothing anomalous about the adaptation of institutions to the prevailing political opinions. In fact, ignoring the change in attitude and continuing on with a program which was formerly appropriate might no longer be legitimate. What is normatively required is not a particular set of institutions or even a particular degree of redistribution, but rather the adaptation of institutions to people's attitudes toward redistribution.

An important distinction between redistribution based upon principles of distributive justice and redistribution based upon principles

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107. I am not referring here to adaptations of a given model to changing circumstances. Having adopted a particular distributive model, a country may find that changes in overall wealth or in wealth distribution require, for example, a modification of tax rates to obtain the same results which the previous tax rates had formerly been able to achieve. What I am concerned with, in other words, is the phenomenon of shifting goals which a society sets for itself, not the adaptation of the means by which it achieves those goals.

108. One of the functions of the social philosopher, on this view, is to show people what their moral obligations are in the field of distributive justice.

of benefit theory may be the extent to which the granting of benefits to the less well-off may be conditional. Where justice requires a redistribution, the ability of those in possession of the wealth to impose conditions on its redistribution is restricted; they can no more impose restrictions on the redistribution of wealth in their possession than can the possessor of lost or stolen property place conditions on the property's return to its rightful owner. Redistribution undertaken based upon the terms of benefit theory is different, in that the extent of justifying redistribution is a function of society's willingness to assist its least well-off persons. It may, therefore, impose conditions on the granting of that assistance.

However, conditions may be imposed in practice, even when assistance is granted within the context of needs-based justice. Provided that the condition is reasonable, one who refuses to satisfy the condition would no longer meet the criteria of neediness. Assume, for example, that aid to the needy is conditional upon their entering a job training program or undergoing treatment for whatever condition is responsible for creating or perpetuating their state of neediness. Provided that the condition to receiving assistance is reasonable, its imposition would not violate the distributive obligations of those who are in a position to help. As previously mentioned, anyone who is presently capable of supplying his own needs should not be classified as needy. As long as the opportunity remained available and the conditions remained reasonable, there would be no duty to assist those who, due to an unwillingness to meet the conditions, declined the proffered assistance.

#### *F. Benefit Theory, Distributive Justice, and the Terms of Public Debate*

Would debates over public policy be affected by viewing the question of redistribution as one to be discussed under the terms of benefit theory as opposed to under the terms of distributive justice? One might argue that the effect would be minimal. As a practical matter, each participant in the public policy debate attempts to convince her audience that the views she espouses are preferable to the alternatives. The political process then judges the effectiveness of the arguments raised on all sides and adopts an appropriate position. The procedure appears to be similar whether the arguments are based upon criteria of distributive justice or benefit theory. Nevertheless, there would be significant differences between the two.

Where the debate is held under the terms of distributive justice, each participant argues that his position is the correct one and is mandated by considerations of justice. The attitude of his audience is inconsequential

for the purpose of determining the moral value of his arguments. If his arguments are correct, then justice requires their adoption. A proponent of the difference principle, for example, would presumably argue that the only just course of action for society to take is to establish institutions which implement that principle. The fact that the vast majority of society might reject the Rawlsian model would in no way affect the fact that it is morally required. The job of the would-be molder of public opinion is simply to convince his audience of society's moral obligation. The audience, in fact, is only important for procedural reasons. It is only because they hold the key to implementing the proposed model that they need to be convinced.

Furthermore, members of the target audience need not be convinced that they are happy with the proposed redistribution scheme. It is enough that they feel it to be their obligation. For example, there is nothing anomalous about a person responding to a justice-based argument by saying, "I do not like the idea of sharing so much of my hard-earned wealth with others, and I wish that I did not have to do so, but it appears to be my moral duty."

When, on the other hand, the debate over public policy is held within the framework of benefit theory, the target audience plays a substantive, rather than merely a procedural role in shaping social institutions, as public opinion determines not just what will most likely happen, but what ought to happen. The justification, under benefit theory, for instituting a more extensive redistribution than is required by the dictates of distributive justice is that by providing transfer payments to the less well-off, the government provides a service to those who prefer living in a more economically equal society. The government is therefore justified in redistributing wealth to the extent and only to the extent necessary to satisfy that preference.

When the mood of the public changes, the degree of redistribution that is justifiable will also change. For example, when members of the public are less interested in redistribution than they were previously, the government would not be entitled to continue charging them for a service which they were no longer interested in receiving. Redistribution would need to be scaled back, although the minimum level of redistribution necessary to satisfy the demands of distributive justice would, of course, have to be maintained in any case. When, on the other hand, public support for redistribution increases, a course of action which may not have been legitimate in the past might become justified.

Thus, convincing the target audience of the need for a more extensive redistribution, for example, is not a means to a just result under the benefit theory. Without the public's support, a more extensive

redistribution is not just politically impossible, it is actually unjust. Convincing others to share one's personal preferences could therefore affect not just what the government will do, but what it ought to do.<sup>109</sup>

## V. CONCLUSION

The international arena must be considered when testing proposed principles of distributive justice. If applying those principles in the international context conflicts with one's considered judgments regarding moral duty, the conflict might indicate a need to rethink the principles. Furthermore, an examination of considered judgments regarding moral duty in the international context might show them to be relevant for the domestic arena as well.

Many social philosophers signal their discomfort with the international implications of the principles they espouse simply by ignoring the international arena. Recently, however, scholars have begun to examine the international implications of principles that have been developed domestically. While some are willing to apply those principles globally, most who consider the issue are hesitant to do so and have

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109. In order to highlight the differences between public policy debates in the framework of distributive justice as opposed to those held in the framework of benefit theory, consider the implications of circumventing public opinion and attempting to influence decision-making by a direct appeal to those with actual decision-making power. Where issues of distributive justice are concerned, such an appeal would, ostensibly, be justified. The fact that the decision does not conform to what the public wants is irrelevant, as the decision conforms to what the public is morally required to do. Where, on the other hand, the issue is one of benefit theory, convincing the public is necessary in order to justify the implementation of one's own predilections.

The approach suggested here may be helpful, for example, in formulating the principles concerning the appropriate role of the judiciary in matters of fiscal policy. The courts, on this view, may be a legitimate venue for addressing issues of distributive justice. Distributive justice, after all, addresses the fundamental question of what belongs to whom, and what belongs to whom is a question which courts routinely address.

When a dispute arises as to property rights, the substantive issue before the court is not usually the question of who presently possesses the property, but rather who is entitled to possession. An argument that the court's function must be limited to determining who is in actual physical possession and that opining on who is entitled to possession is beyond the court's mandate would, of course, be summarily rejected. The job of the court is to determine the right of possession, and if the party with the right to possess the property is not the party in actual possession, to act so as to rectify the situation. Their ruling on issues of distributive justice would be no more an overstepping of the bounds of their authority than are their rulings on issues of transactional, compensatory, or punitive justice.

Beyond the strict requirements of distributive justice, however, a court would have no authority to determine the proper distribution of wealth in society. Whether or not the society in question desires to go beyond the requirements of distributive justice and institute a more extensive redistribution of resources is an issue for the members of that society, acting through the political process, to determine.

This brief note does not, of course, constitute a complete analysis of the role the courts should play, and of their relationship vis-à-vis the legislature, in formulating social policy. Nevertheless, it may be helpful in considering what that role should be.



therefore sought out justifications to avoid extensive international redistribution.

Rawls contended that morally arbitrary factors are inappropriate criteria by which to determine distributive shares.<sup>110</sup> Those who are less favored by nature, he claimed, have an equal moral claim to primary goods, the only justification for unequal distribution of resources being economic efficiency.<sup>111</sup> Yet, if morally arbitrary factors are indeed inappropriate criteria by which to determine distributive shares, it would seem to follow that allowing nationality to determine who is entitled to what is problematic.

If justice requires a Rawlsian redistribution, it must demand that the same principles be applied to all, without regard to race, religion, gender, caste, natural talents, social position, or nationality. If, on the other hand, nationality is a legitimate factor in determining distributive shares, it is unclear why other, equally arbitrary characteristics could not be legitimate factors also. The former premise leads to cosmopolitanism and the latter leads to libertarianism. Capturing the middle ground between cosmopolitanism and libertarianism requires adopting a position that recognizes, on the one hand, that morally arbitrary factors do in fact determine distributive shares and does not impose upon human society the obligation to neutralize the effects of those factors, and yet, on the other hand, does not dismiss redistribution as an essential element of distributive justice.

Needs-based justice does not impose any duty to mitigate economic inequality *per se*.<sup>112</sup> It does, however, require the proffering of assistance to those in need when the cost and risk involved in doing so are not prohibitive. However, when organizing its internal affairs, a state may, in certain circumstances, go beyond the strict requirements of distributive justice. Where members of the society are interested in a more extensive internal redistribution, the state may provide some of the wants of the less well-off members and charge the others for the service provided. The extent of redistribution permissible under such a scheme would be established not by any philosophically determinable formula, but rather by the actual predilections of the particular society concerned at any given moment in time.

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110. RAWLS, *supra* note 1, at 72–75.

111. *Id.* at 151.

112. Rawls's own conception of international obligations strongly resembles needs-based justice. See RAWLS, *LAW OF PEOPLES*, *supra* note 9, at 117.